No. 3971

Office - Supreme Court, U.S.
FILED
AUG 23 1951
JOHN T. [illegible], Clerk

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13245

ARTHUR W. NEWBURY, APPELLANT

v.

HAROLD ROBERT LOVE, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
In [illegible] Circuit

INDEX TO JOINT APPENDIX

	Page
Complaint	1
Motion for summary judgment	7
Affidavit of Arthur W. Newbury	7
Answer	7
Defendant's interrogatories	10
Objections, exception and answers to defendant's interrogatories	10
Pretrial proceedings including defendant's pretrial memorandum, factual outline of plaintiff's case and order	11
Transcript of proceedings, November 23, 28 and 29, 1956	14

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13245

ARTHUR W. NEWBURY, APPELLANT

v.

HAROLD ROBERT LOVE, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action 2375-53

HAROLD ROBERT LOVE, 3912 – 39th Ave. South, Minneapolis 6, Minnesota, PLAINTIFF

vs.

ARTHUR W. NEWBURY, 5415 Connecticut Ave. N. W., Washington, D. C., DEFENDANT

COMPLAINT BASED ON MALICIOUS PERJURY, LIBEL AND FALSE DEFAMATION

(Filed May 26, 1953)

With Demand for Damages, Costs and Disbursements Plaintiff shows to the court:

(a) Jurisdiction founded on diversity of citizenship and amount. Plaintiff is a citizen of the State of Minnesota

and defendant is a citizen of another state and resident of the District of Columbia. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars.

(b) Jurisdiction founded in Sections 11-305, 306 and 315 of the District of Columbia Code, 1940 Edition and Section 135, 63 Stat. 108 amendatory thereof; Section 142 of the Act of May 24, 1949, c . 139, 63 Stat. 110, retaining the substance of the prior acts.

1. Defendant has continuously, from about May 1947 and from time to time thereafter, at various and sundry places, to the date set forth below, including but not limited to, the District of Columbia, the states of Virginia, Maryland, Pennsylvania, New York, Ohio, Kentucky, Indiana, Illinois and Minnesota, with malicious intent and purpose, to prevent plaintiff performing his employment and the reporting upon as field investigator of the U. S. Army Q. M. Corps and the U. S. Army Audit Agency, while assigned with Federal Bureau of Investigation Agents, to cover suspected fraud, bribery and other unlawful practices and actions of U. S. Army Officers and actions of the Army Finance officers and Government personnel; uttered unlawfully, criminal libel, perjury, slander, and false defamation, directed against plaintiff, and caused to be repeatedly uttered by defendant and others, certain false, perjury, crimianlly [sic] libelous and derogatory statements to United States Senators, their staff members, attorneys at law, past and prospective employers of plaintiff, his friends, associates, acquaintances, public officials or employes, [sic] as hereinafter set forth and spread the same far and wide, to cause and did cause plaintiff to lose his established employment, to prevent and did prevent him obtaining other employment, caused him to be shunned, avoided, scorned and held up to contempt and ridicule, in his relations with past and prospective employers, the U. S. Civil Service Commission and its employees, all reflecting upon the character, integrity, honesty, reputation and stability of plaintiff, and

his business relations, and has caused plaintiff great embarrassment, suffering, injury, pain, disturbance, damages, expenses, loss of employment, livelihood and personal injury.

2. During said times, defendant did cause to be obtained and presented to said aforementioned persons statements and the substance thereof, in the manner and for the purpose and intent stated herein at said locations, certain malicious, false perjury, and wholly fictitious statements, while knowing the same were wholly false and fictitious without foundation in fact or truth whatever, with intent to induce others to believe the same and who did believe the same and to use these statements, and who did use the same, for the purpose of terminating plaintiff's employment or prospective employment, and preventing his further obtaining employment and defendant knew that his statement shown as No. 1 below was wholly false, criminal libel, sworn to under oath and over his signature, without foundation in fact or truth, and was wholly fictitious, done with wrongful purpose and malicious, as follows:

(1) "General Mumma stated that Love (and———) have repeatedly searched the official files of the Depot and opened safes, etc., which rights belonged to neither of them".

(2) "This occurred subsequent to Mr. Love's transfer to the AAA and would tend to indicate that he had continued to delve into the files of the Procurement Division of this Depot although he lacked authority to do so".

(3) "I classified these reports (of plaintiff) as crank letters". "In one instance . . . personal difficulty resulted in Mr. Love's temporary incarceration in Louisville, Kentucky . . . based upon certain documents which he is alleged to have copied from the records of this Depot and forwarded to an individual outside the Depot".

(4) "He (Love) jeopardized the security of the agency files and further evidence establishing this point will be stated".

(5) "I was asked what Senator Capehart was doing with files from the Jeffersonville Q. M. Depot. I expressed a great deal of surprise. I was told that the Senator's presentation of the case disclosed documents to be confidential which were a part of the Jeffersonville Q. M. files, and those documents were sent to the Senator by Mr. Love in person".

(6) "It is the belief that this man (Love) is incapable of making an impartial audit, and a review of his work leaves much doubt as to his ability to make an audit. The quality of work by Mr. Love is not superior to that which could be deomonstrated [sic] by a 14 year old boy, the allegations were not adequately supported by evidence and the report by Mr. Love is neither conclusive nor coherent."

(7) "By this act (making false accusations against the Army Audit Agency) you (Love) have exhibited disloyalty to the agency and unconscionable conduct, evidenced by the contents of letter dated 11 June 1937 and willful insubordination evidenced by letter dated 11 June 1947 enclosing copy of 'memo' to Mr. Oscar C. Wright dated 16 June 1947 prepared for the signature of Louis E. Parker relative to the terminated contract settlement proposal of D. E. Rippetoe, Contractor under Contract W-12-036-qm-12130, O.I. C-11769-5x. An act of this type on the part of a Federal employee is considered an exhibition of dishonesty to the Government, disloyalty to the employing agency, and a discredit to the service. The same letter (11 June 1937) states that the Army Audit Agency has seen fit to continue Mr. Alexander's services against the specific order or instruction of a Brigadier General. The Army Audit Agency has no record or knowledge of any such order or instruction being issued. Release of audit information, after direct telephonic instructions not to do so, is willful insubordination".

3. The statements of defendant set forth aforesaid, were well known to him as made over his signaturem [sic] to be

false, perjury, fictitious and maliciously made with improper motive, and he had access to and had before him copy of a specific order or instruction of Brigadier General Harlan L. Mumma, Q. M. C. which read in part:

> "Mr. Alexander would possibly have access to files pertaining to contract terminations on which he had previously worked as auditing accountant, through their assignment to him by AAA. It would seem that under those circumstances it would be preferable to assign him to some other area."

and defendant had access to and knew of, or had copy before him, of letter written "FOR THE COMMANDING GENERAL", said Harlan L. Mumma, by and over the signature of "Raymond L. Springer, Major, Q. M. C. Assistant", addressed to said Army Audit Agency which read in part as follows:

> "This case has been reported to higher authority as a suspected violation of Section 19-C of the Contract Settlement Act and available information pointed to the possible involvement of Mr. Alexander in the matter. It was suggested to this Depot that Mr. Alexander be used in such a manner that the files and records under review not be available to him.
>
> A letter was prepared from this Depot under date of 3 January 1947 . . . recommending that, should an Army Audit Agency Field Office be established at this installation, steps be taken to secure this auditor's assignment to some other office.
>
> This entire matter was discussed in detail with Mr. McCormick, representative of the Army Audit Agency during his recent inspection of this Depot."

4. Defendant's motive in utterring, having repeated and spreading the said libel, slander, perjury and defamation set forth herein was with intent to prevent and destroy plaintiff's ability and to prevent the completion of his officially assigned duties required by statute, and to prevent the performance thereof as required to report upon fraud, bribery and collusion with war contractors and to

permit the allowance of their fraudulent claims and cover up theft of Government property in collusion and involving certain Army Officers, military personnel, other Government agents, and other related matters, and as part of a planned whitewash conducted by other Army Officers, and did destroy plaintiff's ablity [sic] to perform and complete his reports under his official employment and assignment as field Cost Analyst and investigator, of the War Department, and the Department of the Army and their Army audit Agencies as required by law.

5. Defendant at no time involved had authority or jurisdiction to exercise any civil function of any Executive Department of the Government or executive agency of the United States, and was prohited ty statute from exercising any civil function, office position in an Executive Department or agency of the United States.

6. Plaintiff in the past has been an Army Officer, of the General Staff of the U. S. Army, was honorably discharged from such service during war time, and for a period of about 25 years had been lucratively employed and engaged in the field of public accounting and auditing and tax work, and in various capacities with the United States Government, including over three years as an Internal Revenue Agent of the Treasury Department, field investigator, senior accountant, cost accountant, and supervisory auditor for the Navy and War Departments, upon difficult, complex and specialized, fraud investigations and costs analysis, and for a number of other years was engaged in public practice in the accounting and auditing field, with a large, lucrative and substantial income accruing therefrom.

7. Plaintiff has suffered actual damage by reason of defendant's actions as aforesaid, in excess of $30,000.00 and has been further damaged in his reputation and business.

WHEREFORE, plaintiff demands judgment against defendant in the sum of $130,000.00, for actual, special, punitive and exemplary damages, and his costs and disbursements.

Motion for Summary Judgment

(Filed June 23, 1953)

Comes now the defendant and by his attorney, the United States Attorney, moves this Honorable Court to enter summary judgment for the defendant in accordance with the provisions of Rule 56(b) of the Federal Rules of Civil Procedure on the ground that there is no genuine issue of material fact and defendant is entitled to judgment as a matter of law, as more fully appears from attached affidavit.

Affidavit

(Filed June 23, 1953)

State of Virginia,
County of Arlington, ss

Arthur W. Newbury, being first duly sworn, says:

That he is the defendant in the above-entitled action.

That he is now and was, at all times material herein, Director of Civilian Personnel, Finance Corps, United States Army and Special Assistant for Civilian Personnel to the Chief, Army Audit Agency.

That the allegedly libelous statements referred to in the complaint were made by him in the course of proceedings relating to the discharge of plaintiff from Government employment.

Arthur W. Newbury.

Answer

(Filed August 4, 1953)

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

(a) and (b). Defendant is not required to answer the allegations contained in paragraphs (a) and (b) of the complaint.

1. Defendant admits the making of two statements regarding plaintiff and admits that said statements were presented to the Civil Service Commission. Defendant denies the remaining allegations contained in paragraph 1 of the complaint.

2. Defendant admits making the statements numbered (1) and (7) contained in paragraph 2 of the complaint. The statement numbered (1) was given to one John E. McElderry, an investigator for the Civil Service Commission during the Commission's investigation of plaintiff. The statement numbered (7) is a composite of charges contained in a Notice of Charges sent to plaintiff by defendant pursuant to section 9.101, Title 5, Code of Federal Regulations. The remaining allegations of paragraph 2 are denied.

3, 4, and 5. Denied.

6. Defendant is without information sufficient to form a belief as to the truth of the allegations contained in paragraph 6 of the complaint.

7. Denied.

Third Defense

At the time in question, plaintiff was a civilian employee of the Army Audit Agency. Defendant occupied the position of Chief of Civilian Personnel, United States Army Finance Corps, and Special Assistant for Civilian Personnel to the Chief, Army Audit Agency. Any statements made by defendant were made in connection with proceedings relating to plaintiff's suspension and discharge from Federal Employment. As such the statements were made by defendant in furtherance of his official duties and were thus made within the scope of his authority.

Fourth Defense

Each of the statements contained in paragraph 2 of the complaint and upon which plaintiff bases his cause of action were made on the following dates:

(1) September 2, 1947
(2) November 14, 1947
(3) November 14, 1947
(4) January 8, 1948
(5) November 14, 1947
(6) July 31, 1947
(7) July 11, 1947 and
July 18, 1947

Therefore, even if these statements were actionable, plaintiff's cause of action thereon is barred by the statute of limitations in that they were made more than one year prior to the institution of this action. Title 12 D.C. Code (1951 Ed.) Section 201.

Fifth Defense

The charges made by defendant and others against plaintiff are true and were so found by the Civil Service Commission, which sustained the dismissal of plaintiff on the charges made.

Sixth Defense

Any statements relating to plaintiff which were made by defendant were privileged in that they were made in good faith, without malice, and defendant was under a duty to make them. Defendant at no time communicated his remarks regarding plaintiff to any person who was not entitled to hear or see them.

WHEREFORE, having fully answered, defendant demands judgment together with costs of this action.

Interrogatories

(Filed November 4, 1953)

TO: Harold R. Love, plaintiff:

Please take notice that the defendant herein requires you to answer the following interrogatories and serve copies of your answers upon the undersigned attorneys for defendant within fifteen days from the date of service hereof pursuant to Rule 33 of the Federal Rules of Civil Procedure.

1. Please state the names of the persons to whom you claim the defendant communicated defamatory statements regarding you.

2. Please give the addresses of each of the person listed by you in response to interrogatory number one.

3. Please state what defamatory statements were made to each of the persons referred to in interrogatory number one.

4. Please state when and where each of the allegedly defamatory statements made.

• • • • •

Objections, Exception and Answers to Defendant's Interrogatories

(Filed November 16, 1953)

Objection

Comes now the plaintiff and objects to the notice of service on the interrogatories and takes exception on the ground there has been failure to comply with the mandatoary requirements of Rule 6 (e) F.R.C.P. requiring notice period to include an addition of 3 days to the 15 days specified in Rule 33, F.R.C.P.; the 15 days notice period as given was improper and insufficient; 18 days notice being mandatory upon service by mail.

Subject to the above objection and exception; without waiver of such;

Comes now the plaintiff and having been duly sworn makes the following answer to the interrogatories:

1. Please state the names of the persons to whom you claims the defendant communicated defamatory statements regarding you.

(13) Harry J. Maginnis

(23) • • •

2. Please give the addresses of each of the person listed by you in response to interrogatory number one.

Last known addresses and locations

(13) Washington, D. C.

(23) • • •

3. Please state what defamatory statements were made to each of the persons referred to in interrogatory number one.

Referring to • • • (13) the defamatory statement that plaintiff had stolen documents or files of the Government and given them to Senator Homer E. Capehart • • •.

4. Please state when and where each of the allegedly defamatorny statements made.

(13) 1952 and thereafter; Gravelly Point, Washington, D. C. and Arlington, Va.

(23) • • •

PRETRIAL PROCEEDINGS

Statement of Nature of Case:

Pretrial Statements of Parties Attached and Approved.

(S.) —— ——,

Judge.

Defendant's Pretrial Memorandum

(Filed October 29, 1954)

This is an action for damages claimed to have been suffered by plaintiff as the result of allegedly defamatory statements made by the defendant. The allegedly defamatory statements are contained in paragraph 2 of the complaint.

The defendant is and was, at all times material, Director of Civilian Personnel, Finance Corps, United States Army, and Special Assistant for Civilian Personnel to the Chief, Army Audit Agency. Of the allegedly defamatory statements contained in paragraph 2 of the complaint, only those numbered 1 and 7 are attributable to the defendant. Each of these was made by the defendant in the course of his official duties, more particularly, in the course of proceedings relating to the discharge of plaintiff from Government employment. Accordingly, defendant is immune from liability therefor. Defendant has never made any statements regarding the plaintiff which were not made within the scope of his official duties. He at no time communicated his remarks regarding plaintiff to any person who was not entitled to hear or see them. The statements contained in paragraph 2 of the complaint, upon which plaintiff bases his cause of action, were all made no later than January 8, 1948.

* * * * *

Factual Outline of Plaintiff's Case

Comes the above named Plaintiff and presents to the Court a brief factual outline:—

1. (a) The nature of the action is one for libel asking relief by way of damages, actual in excess of $30,000.00, special and punitive in addition for a total in excess of or limited to $130,000.00.

2. The facts relied upon are:

a. Defendant falsely under oath maliciously, secretly while on federal land and property and at various and sun-

dry places repeated and represented that plaintiff broke into a government safe without right extracted files and gave them to persons not entitled thereto jeopardizing the security of government records.

3. Denying plaintiff opportunity to answer and defendant himself against such vicious libel constituting specifically a crime under the Civil Service Act (Title V, Section 637, U.S.C.A.).

c. Defendant's actions depriving plaintiff of his right to a livelihood and of employment in the civil service paying in excess of $5,152.80 per annum from and after July 16, 1947 causing the amount of actual damage to plaintiff, were malicious per se in that plaintiff is falsely accused of a crime in charge secretly made to the United States Civil Service Commission make upon federal property and filed there, i.e. The Pentagon Building of the United States Government not within the area comprising the state of Virginia, and spread far and wide elsewhere for which plaintiff demands damages to his profession and business, special, punitive and exemplary damages, based on such allegedly uttered libel.

• • • • •

ORDER

Pursuant to an order of the court dated October 21, 1954 the above matter came on for pretrial hearing on October 29, 1954, before Judge McGuire.

Factual outline stating (a) the nature of the action and relief sought and (b) the nature of defense hereto attached has been presented and filed, with statement of the facts relied upon.

IT IS ORDERED: the case go forward in the usual order on the trial list, or for trial at —— o'clock on ——, 1954.

——— ———,
Judge.

Date: October 29, 1954.

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2375-53

HAROLD ROBERT LOVE, PLAINTIFF,

v.

ARTHUR W. NEWBURY, DEFENDANT

Washington, D. C.,
November 23, 1955.

The above-entitled action came on for trial on the merits, before the Honorable BURNITA SHELTON MATTHEWS, United States District Judge, and a Jury, at 12 o'clock noon.

APPEARANCES:

On behalf of the Plaintiff: CHARLES F. O'NEALL, Esq.
On behalf of the Defendant: ROBERT L. TOOMEY, Assistant United States Attorney.

* * * * *

[6] OPENING STATEMENT ON BEHALF OF PLAINTIFF

Mr. O'NEALL:

* * * * *

[7] We will show you and, in this instance, this relates rather closely and particularly to a matter which you will be asked to pay attention to when the defense speaks to you, that is the statute of limitations; we will prove to you that within less than a year of May 27, 1953, in other words, before the statute of limitations ran, Mr. Love came to Washington from where his home is out in the middle west and he called on a lawyer in this city who had recently won great notoriety of a favorable kind, having finally obtained justice for his client by taking a case to the Supreme Court, that was a civil service case. Mr. Love called on this lawyer and asked him to correct the miscarriage of justice in his own case.

[8] This lawyer, as we will prove to you, called Mr. Newbury, whom he knew in connection with that same previous litigation, and inquired of him whether or not something might be done to settle this case. At that time, as Mr. Love will testify, all or part, and it will be up to you to decide how much, it will be up to him to tell you precisely how much of the defamatory or libelous statements were repeated to that attorney. We will submit evidence to show to you that that statement by Mr. Newbury at that time cannot be justified on any ground of privilege.

• • • • • •

[10] OPENING STATEMENT ON BEHALF OF THE DEFENDANT

Mr. TOOMEY: Ladies and gentlemen of the jury, the Court please, I think actually this is going to be a pretty simple case because you are going to find that there isn't much of a factual dispute between Mr. Love and the defendant, Mr. Newbury. I would like to place, though, just for a few moments, the facts into what I think is the proper focus.

Back in July or June of 1947, Mr. Love was employed by the Army Audit Agency which was at that time within the old War Department, now Department of the Army. Mr. Newbury was assigned to the position within that same agency of Chief of the Civilian Personnel Branch of the Department of Finance, the Finance Corps of the Army. As such, he was the chief civilian officer over Mr. Love.

Now, on June 11, 1947, a notice of charges proposing his separation from government service was sent to Mr. Love by Mr. Newbury in his official capacity as Chief of Personnel. The notice of charges contained, generally speaking, the matters referred to by counsel for the plaintiff in his opening [11] statement. The plaintiff, Mr. Love, thereupon on the 15th of July, 1947, sent a letter to Mr. Newbury in his official capacity again, requesting details with respect to these charges which had been served upon him. Whereupon, on the 18th of July, 1947, a supplemental notice of charges was sent by Mr. Newbury, once again in his

official capacity, to Mr. Love. Mr. Love, on the 4th of—I have lost the date, sometime subsequent thereto, in July, the 21st of July, 1947, Mr. Love made reply to the notice of charges.

On the 4th of August, 1947, Mr. Love received a letter from the defendant, once again acting in his official capacity as Chief of Civilian Personnel, notifying him that he was to be discharged as of thirty days from that time and that he was to be suspended during that thirty-day period.

Mr. Love thereupon took an appeal to the Director of the Sixth Civil Service Region, that is an intermediate, and probably many of you are familiar with it, an intermediate agency within the Civil Service. He took an appeal and challenged the discharge action as well as the suspension. He said, "I should not have been suspended, you didn't tell me any reason for my suspension and, therefore, the suspension was illegal and also the discharge."

The matter was heard by the Director or one of his representatives of the Sixth Civil Service Region and they concluded that Mr. Love was indeed right on a technical point, to wit, that he had not been advised of the reason for the suspension [12] and, therefore, they ordered the Department of the Army to restore Mr. Love.

The Army, as it had a right to do, appealed that decision to the Civil Service Commission itself here in Washington. As a result of that appeal, the Civil Service Commission in Washington decided that the Department of the Army or War Department, acting in this case through Mr. Newbury, was not required by the law to justify to Mr. Love the reason for his suspension but that it was required to justify that suspension to the Civil Service Commission. However, said the Civil Service Commission, both sides agreed that the case should be more fully developed on its facts and, therefore, we remand the case back for further investigation.

There was further investigation and as a result of that, on the 18th of January, 1948, the Director of the Sixth Civil

Service Region reversed himself and held that both the discharge and the suspension of Mr. Love had been justified. It is interesting to note that, in the opinion, the Director of the Sixth Civil Service Region stated that Mr. Love had indeed jeopardized the security of government files at his place of employment, Jeffersonville Quartermaster Depot.

Mr. Love thereupon appealed that finding to the Civil Service Commission. They had hearings before the Civil Service Commission for two days on the 24th and 25th of February, 1948. These hearings were held here in Washington before the Board of Appeals and Review of the Civil Service Commission. As a result of that hearing, the Commission decided on July 23, [13] 1948, that the discharge as well as the suspension had been in all respects proper and affirmed Mr. Love's dismissal from federal employment.

Now, that was the end of the case in so far as Mr. Newbury was concerned, back on July 23, 1948; from that point on, he had nothing to do with it, there was nothing more for him to do. Mr. Love was out of the Department of the Army and that was the end of the matter in so far as Mr. Newbury was concerned.

I would like to go back just one moment to make reference to the statement quoted to you, attributed to Mr. Newbury, that "General Mumma said that Mr. Love had repeatedly searched the files of the agency which rights he did not have." That statement was indeed made by Mr. Newbury, we don't dispute it. Counsel won't have to prove that to you, we admit it, we admit that statement and the statements which were taken from the letter of charges. That statement was made by Mr. Newbury on September 2, 1947, as a part of the investigation which was being conducted by the Sixth Civil Service Region covering this particular employee discharge case. An investigator of the Civil Service Commission came to Mr. Newbury and asked him for a statement with reference to the case, with particular reference to the suspension without pay during the thirty-day period, and this affidavit was thereupon

given by Mr. Newbury to the investigator from the Civil Service Commission, September 2, 1947. So, that is all that Mr. Newbury has had to do with Mr. Love.

[14] At the end of that, he had no more concern with Mr. Love, there was no reason for Mr. Love to be discussed by him and, in fact, Mr. Love was not discussed by Mr. Newbury subsequent to that time. Mr. Love was just another case to a man who was running the whole personnel program of the Army Audit Agency, he meant nothing to him. When the case was concluded by the Civil Service Commission, the file was closed; as a matter of fact, all of the files relating to Mr. Love were shipped out of Mr. Newbury's office and he had nothing more to do with it, July 23, 1948.

So, on May 26, 1953, I think it was May 26, it was around that time, Mr. Love filed this suit against Mr. Newbury for acts done by Mr. Newbury within the course of his duties, and for acts done six years previously to the filing of the complaint; and for that, he asks that Mr. Newbury reimburse him in damages.

There has been something said about the fact that the statements made by Mr. Newbury with reference to Mr. Love are in the public files of the Civil Service Commission. Of course, they are in the files of the Civil Service Commission, but I think—of course, once again I would be intruding on the Court's prerogative to try and argue the law to you—I anticipate, however, the Court will instruct you that that does not amount to a publication, if you will, a republication of this allegedly defamatory matter so as to make this man liable for something done six years earlier, if indeed it was wrongful at all.

[15] There has been reference made to the fact that a Mr. Magiannis, an attorney in Washington, called Mr. Newbury and that Mr. Newbury in the course of that conversation repeated this defamatory matter over the telephone, sometime between May 1952 and May 1953. Our statute of limitations here is one year in libel actions. We will show to you that simply is not the fact; I will say no more than that, it is not so and we will show you that it is not so.

So, in conclusion, we will ask you at the proper time to return a verdict for the defendant and against the plaintiff.

* * * * *

[16] Mr. Toomey: It occurred to me that we could probably save a good deal of time in this case by a stipulation. As I understand, the plaintiff offered to prove, apart from the—we had the charges in 1947, the affidavit in 1947—apart from that, and the plaintiff's theory of continuous publication, the only other publication alleged by your opening statement was this so-called telephone call from Mr. Maginnis, or to him, between the two of them.

Now, I would propose that we stipulate that on July 11 and July 18, 1947, the defendant did send the letter of charges and the supplement thereto which contained the statements alleged in paragraph 2 (7) of the complaint.

Mr. O'Neall: You have already admitted that.

Mr. Toomey: Exactly, and also on September 2, 1947, he made this affidavit and gave it to the Civil Service Commission investigator. That would leave actually for the jury's decision only the question of whether there was a publication to Mr. Maginnis within the statutory period and the question of law for Her Honor of whether or not the fact that these matters are in public records constitutes a continuous publication. It seems to me we could conceivably get through with [17] the case today instead of all of this business which is beyond the period of limitations; it is unnecessary, especially in the light of the fact we concede the making of the statements.

Mr. O'Neall: Yes, but you don't concede the motives for the making of the statement.

* * * * *

[22] Harold Robert Love plaintiff, called as a witness in his own behalf, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. O'NEALL:

. . . . . .

Q. Now, then, about roughly a total of how many years have you worked for the federal government? A. About twenty.

. . . . . .

[23] Q. All right, sir. Now, did there come a time when you were assigned to the military installation at Jeffersonville? A. Yes.

Q. Where is that installation and what is its full name? A. Just across the river from Louisville, Kentucky, in Indiana. The installation title was the Quartermaster Depot of the United States Army, War Department.

Q. At the time you were assigned to Jeffersonville, what part of the War Department or Army Department were you connected with? A. Quartermaster Corps.

Q. While you were there, were you transferred over to the Army Audit Agency? A. Yes, I was.

Q. And was that a sort of an administrative arrangement so far as you know, that is all that amounted to, it wasn't a new assignment? A. No.

Q. Just a transfer. Now then, sir, at that time what was the nature of the work you were performing and the others assigned in your group? A. Auditing the fraud in contracts under the Contract Joint Settlement Act and regulations of 1945.

[24] Q. Now, the time we are speaking of is December and early December, 1946, I think that is when you transferred to Army Audit Agency, is that correct? A. Yes.

Q. So, in 1947, the early part of 1947, you were available there for contract fraud investigation, is that correct? A. I was continually doing it in the field.

Q. All right, sir. How many people were in the same section with you at Jeffersonville in the early part of 1947? A. Four.

Q. Did a time come when you received a notice that you were to be demoted? A. Yes.

Q. About when did you receive that notice? A. June 1947, or May.

Q. I show you that paper and ask you if you can identify it? A. Yes, I can.

Q. With this in front of you, can you now inform the jury—just a minute.

Mr. O'Neall: Pardon me (handing paper to Mr. Toomey).

By Mr. O'Neall:

Q. With this letter before you, can you now state when you received notice that you were to be reduced in grade? I mean what was the date of the notice to you? A. June 3, 1947.

[25] Q. What was the notice given to you, what did it state, what was to be the result? A. That I was to be changed from CAF-11 at $5,152.80 per annum to cost analyst CAF-8 $4,525.80 per annum.

Q. Now, then, I show you another paper and ask you to state if you, subsequent to June 3, 1947, did you receive another notice on the same subject from the Finance Office of the United States Army? A. Yes.

Q. What date does that other notice bear? A. June 10, 1947.

Q. What does it purport to promise for you? A. (No response)

Q. Demotion, promotion? A. It repeats the same thing and gives more information in regard to it.

Q. But you were again notified you were to be reduced? A. From an 11 to an 8.

Q. Thank you, sir.

Mr. O'Neall: I don't believe that we are going to have to introduce these in evidence, I believe the testimony is unobjectionable.

By Mr. O'NEALL:

Q. Now then, sir, did there come a time—before we go to this next point, may I ask you this: There were, as I recall you said, there were four people available there in [26] Jeffersonville for this fraud audit work in your unit? A. Yes.

Q. Now then, sir, did a time come when you received the notice of charges against you? A. Yes.

Q. I show you this and ask you to look at it. These are the charges, this is a photo copy of the charges you received? A. Yes.

Q. Now, this is dated 11 July 1947.

Mr. O'NEALL: And members of the jury, it has been stipulated by counsel that this is the notice that was received by —given by the defendant and received by the plaintiff and I will read this statement to you.

The COURT: Let Mr. Toomey get his copy so he can read it with you.

Mr. O'NEALL: I have one for Your Honor. I believe it is in the file.

The COURT: That is all right.

Mr. O'NEALL: Leaving out the file number, from War Department, Office of the Chief of Finance, Washington 25, D. C., the date is 11 July 1947. Subject: Notice of Charges. To: Mr. Harold R. Love, 718 East Chestnut Street, Jeffersonville, Indiana:

"1. You are hereby advised that pursuant to Civil Service authorization, Section 9.101, the charges listed below have been placed against you in support of a recommendation for your discharge and removal. You are hereby [27] suspended without pay effective 16 July 1947, for a period of five days pending action on the recommendation:

"Charge I. Making false accusation against the Army Audit Agency by which you are employed. By this act you have exhibited disloyalty to the Agency and unconscionable conduct as a Federal employee.

These charges are evidenced by contents of letter dated 11 June 19''—pardon me just a moment.

Let's stipulate the correct date now so we don't have to continue to explain it:

"'These charges are evidenced by contents of letter dated 11 June 1947, bearing signature of Harold R. Love, addressed to Civilian Personnel Officer and the Administrative Officer, Finance Office, U. S. Army, 238 East Wyoming Avenue, Philadelphia 20, Pennsylvania.

"Charge II. Willful insubordination by reason of performing an act which constitutes an unauthorized assumption of authority, the act being directly contrary to published policies and procedures and direct telephonic orders from your higher headquarters. These charges are evidenced by letter dated 11 June 1947, bearing signature of Harold R. Love, addressed to Finance Officer, U. S. Army, Philadelphia, Pennsylvania, which came to the attention of the Philadelphia Regional Office, Army Audit Agency, on 19 June 1947, and by letter dated 19 June 1947, bearing signature of Harold R. Love, addressed to Chief, Industrial Audit Division, Philadelphia Regional Office, [28] Army Audit Agency, inclosing copy of 'Memo' to Mr. Oscar C. Wright, JQM Depot, dated 16 June 1947, prepared for the signature of Louis E. Parker, as Cost Analyst, Chief, CPAB, JQMD, Jeffersonville, Indiana. The 'Memo' report was relative to terminated contract settlement proposal of D. E. Rippetoe, Contractor, under contract W-12-036-qm-12130, O.I. C-11769-5.

"2. It is requested that you answer the above charges within five days from the date you receive this letter. At that time your reply will be given consideration before final action is taken. If no reply is received, action will be taken on the basis of present evidence. If the reply is not satisfactory, you will be suspended for a period of thirty days prior to your discharge in accordance with Section 14 of the Veter-

ans Preference Act. This suspension will be a non-duty status, but annual leave may be taken for that period, or leave without pay will be granted if you do not have sufficient annual leave to your credit.

"By Order of the CHIEF OF FINANCE: Signed A. W. Newbury, Major, Finance Department, Chief, Civilian Personnel Branch, Management Division."

By Mr. O'NEALL:

Q. Now, Mr. Love, at that time what was the status of the—about when did you receive this? A. July 16, 1947.

Q. Now, about that time, what was the status of the [29] other employees in the Audit Unit at Jeffersonville? A. One of them was under charges and all of them were at that time recipients of notices that they were either reduced or to be dropped.

Q. They had all received either charges or notices they were to be dropped or reduced in grade? A. That is correct.

Q. At about this time? A. Yes.

The COURT: Mr. O'Neall, is that letter that you just read there, what is referred to in item (7) of paragraph 2?

Mr. O'NEALL: That is part of it, Your Honor.

By Mr. O'NEALL:

Q. Now then, sir, did you acknowledge this letter that I have just read to the jury? A. Yes, it was registered and I signed a registered receipt for it.

Q. And did you write to Mr. Newbury as a result of receiving this letter? A. Yes.

Q. What did you ask him in that letter? A. (No response)

Q. You did ask for an explanation? A. An explanation, I wanted more detail so I could understand it.

Q. Now, then, I show you this paper and ask you if you recognize that? [30] A. Yes, I recognize it.

Mr. O'NEALL: This is the July 18——

Mr. TOOMEY: Before you go forward, I don't know whether our stipulation covers it, but I think it should appear of record that these things are going into evidence.

The COURT: They have not been marked.

Mr. TOOMEY: I think they should be.

Mr. O'NEALL: Exhibit 1 for identification.

The COURT: Exhibit 1 is the letter you just got through reading?

Mr. O'NEALL: Yes, Your Honor.

The COURT: Very well, Plaintiff's Exhibit No. 1 is admitted, and the one you now have in your hand is Plaintiff's Exhibit No. 2.

Deputy CLERK: Plaintiff's Exhibit No. 2 for identification.

Mr. O'NEALL: Is this one admitted now?

The COURT: No. 1 is admitted. No. 2 is admitted, too; you concede that?

Mr. TOOMEY: Yes.

The COURT: Very well.

(Letter dated July 11, 1947, to Mr. Love from Mr. Newbury, was marked Plaintiff's Exhibit No. 1 and received in evidence.)

(Letter dated July 18, 1947, to Mr. Love from Mr. Newbury, was marked Plaintiff's Exhibit No. 2 and received in evidence.)

[31] Mr. O'NEAL: This letter has the same letterhead, War Department, Office of the Chief of Finance, Washington, 25, D. C., 18 July 1947. Subject: Supplement to Notice of Charges. It is addressed to the same person:

"1. Reference is made to your letter of 15 July 1945 requesting additional information in relation to charges addressed to you in correspondence from this office dated 11 July 1947.

"2. The letter referred to in Charge I was shown in error as being 1937 and should have read 11 June 1947. In connection therewith, the letter contained the following accusation against the Army Audit Agency:

'There has been apparent cooperation to the extent of encouraging this person, Mr. Alexander's derelictions, and to the extent of disgracing the service and

bringing it into disrepute. This particularly in view of the fact that the Army Audit Agency has seen fit to continue Mr. Alexander's services against the specific order or instruction of a Brigadier General to them not to permit him at this installation over which the General has military control and had at the time he issued his directive, order, or request to the Army Audit Agency or those forming such agency at Washington, D. C.'

"3. This accusation covers a matter which is not encompassed within your duty assignment, and such information would not be available for consideration. The accusation that the Army Audit Agency has cooperated with and [32] encouraged the derelictions of an employee 'to the extent of disgracing the service and bringing it into disrepute' is considered a disloyal and unwarranted statement; an unfounded and false accusation. In addition, the same letter states that 'the Army Audit Agency has seen fit to continue Mr. Alexander's services against the specific order or instruction of a Brigadier General'. The Army Audit Agency has no record or knowledge of any such order or instruction being issued. If such an order, instruction or request has been issued, it would come to the attention of the Army Audit Agency in accordance with delegated authority and prescribed channels. Since no such order, instruction or request has come to the attention of the Army Audit Agency, your statement is considered unfounded, unwarranted, and exhibits unconscionable conduct.

"4. The letter dated 11 June 1947 contains in addition the following statement: 'The writer is now engaged in conference with Colonels of certain Army Audit staffs and with legal and accounting personnel on very difficult matters involving claims against the United States, review of work of CAF-12 graded employees who flagrantly disregarded the regulations, laws to the extent the Government has suffered heavy

financial loss, one such case just recently assigned to this writer involving the former Chief of this sub-section, Mr. Albert Hanes, one other involving Mr. Alexander, another involving a Warrant Officer.'

[33] "5. Immediately upon receipt of the letter, as cited in paragraph 4 above, the probable violation of specific orders was noted, and records of the Philadelphia Regional Office, Army Audit Agency, indicate that the Chief, Industrial Audit Division, Philadelphia Regional Office, Army Audit Agency, as directed by the Regional Auditor, immediately contacted Mr. Love by long distance telephone. Mr. Love admitted that he was doing audit work; that he knew it was not in accordance with specific instructions, but that work was practically completed. Mr. Love attempted to argue the matter as to why he should not be allowed to proceed; he was given direct orders to immediately stop work, forward the material to the Philadelphia Regional Office and to release no information whatsoever. Mr. Love then entered the argument that he was not going to issue an audit finding but was preparing the report for the signature of another agency. He was advised and specific orders were again repeated to immediately stop work, forward the matter to the Philadelphia Regional Office and to release no audit information. Mr. Love was then asked if he understood the orders given. He stated that he did.'

"6. Letter dated 19 June 1947 bearing signature of Harold R. Love, addressed to Chief, Industrial Audit Division included an inclosure entitled 'Report of Phone Conversation' indicated that Mr. Love was aware of instructions to contact Mr. Parker, Chief of the Cost and Price Analysis Branch of the local depot installation and obtain a letter requesting work performance, to obtain the papers and files and forward the same to Philadelphia Regional [34] Office. Mr. Love's letter on file in this office also quotes the directives establishing the policies and procedures which he had violated and indicates also that he was fully aware of the di-

rectives. He takes exceptions and presents arguments in an attempt to justify his actions, including the statement that 'work done at the request of the local agency as shown, entirely on Sunday 15 June 1947, when the Government is not paying for this writer's time'.

"7. The acceptance of this audit assignment by verbal request violates the provisions of War Department Circular No. 61, 5 March 1947, Section 1, Paragraph 2, which requires that such services be obtained by means of written requests. Acceptance and performance of audit work by Mr. Love is in violation of published policies and procedures and direct instructions of the Philadelphia Regional Office, Army Audit Agency.

"8. Release of audit information, after direct telephonic instructions not to do so, is willful insubordination. The preparation in report form of the audit information for a member of a requesting agency is an obvious attempt to evade or nullify authoritative orders and directives, usurps and avoids the authority of the established Army Audit Agency, and is a flagrant attempt to defeat the purpose of the Secretary of War in establishing the Army Audit Agency to render independent functions of audit to the administrative and technical services and the Army Air Forces. An act of this type on the part of a Federal employee is considered an exhibition of dishonesty to the Government, disloyalty to the employing agency, and a discredit to the service."

[35] Signed in the same way the other was signed, by A. W. Newbury, Major, Finance Department, Chief, Civilian Personnel Branch, Management Division.

By Mr. O'NEALL:

Q. You received this letter, Mr. Love? A. I did.

Q. Did the time come when you took an appeal from these charges? A. I did.

Q. When you took that appeal, what was the result of it, by whom did you get the first answer; the first answer you

got was from what agency? A. Civil Service Commission at Cincinnati, Ohio.

Q. What was their verdict and finding and recommendation? A. I was ordered restored to pay as of the time I was suspended, and position.

Q. Are you familiar with that report? A. Yes.

Q. Did that report state they were ruling in your favor "on a technical point"? A. Well, it was nineteen pages.

Q. They didn't say they were ruling for you on a technical point?

Mr. Toomey: Objection, Your Honor. It seems to me if he is going to introduce this opinion, let the opinion speak for itself and not have the witness intepret the opinion for us.

Mr. O'Neall: I will accept that, I think it is probably [36] much better.

The Court: Very well.

Mr. O'Neall: I only want to file the report, Your Honor.

Deputy Clerk: Plaintiff's exhibit 3 for identification.

(Report of Civil Service Commission, dated September 5, 1947, was marked plaintiff's Exhibit No. 3 for identification.)

The Court: Maybe if you show it to Mr. Toomey, you all could stipulate that is it without having to ask questions.

Mr. O'Neall: I would like to ask the witness one question.

The Court: Very well.

(Mr. O'Neall conferred with the witness.)

By Mr. O'Neall:

Q. I ask you to look at that paper and tell me if you can identify those pages? A. There are fourteen, I was wrong on the nineteen, fourteen pages.

Q. These are the original sheets themselves as you received them from the Civil Service Commission? A. I got it by registered mail and I received—no, I didn't get it registered mail, I got it from the Civil Service Commission

at Cincinnati and received it on the 12th of September, 1947.

Mr. O'NEALL: May this be accepted in evidence?

Mr. TOOMEY: I don't know that it has much bearing on the case, but I have no objection.

[37] The COURT: Very well, it is admitted, Plaintiff's Exhibit No. 3.

(Plaintiff's Exhibit No. 3 for identification was received in evidence.)

Mr. O'NEALL: I would like to read, if I may, the findings and recommendation of this report.

The COURT: Very well.

Mr. O'NEALL: The last two paragraphs, beginning on page 13 and ending on page 14, the following two paragraphs are found under the heading "Findings and Recommendations":

"The personnel action of the office of the Chief of Finance, War Department, Washington 25, D.C. relative to the separation of Harold R. Love on the charges of false accusation and willful insubordination was not in accordance with United States Civil Service Regulation 22.2 (c) under Section 14 of the Veterans' Preference Act, in that Mr. Love was not retained on an active duty status for thirty days from the date of the receipt of his adverse notice. It is recommended that Mr. Love should be immediately reinstated to his former position and grade as Cost Analyst CAF-11,"

The next paragraph only has to do with the matter of how appeals might be taken from that.

Now, just before this, under the heading of "Evidence and Analysis," just before that comes this statement:

"The charges which the appellant had an opportunity to answer did not allege or infer that he repeatedly searched the [38] official files of the Depot and opened safes unlawfully, nor was there evidence of these alleged acts in the personnel file of the appellant prior to the date of his final adverse notice."

By Mr. O'NEALL:

Q. Now, Mr. Love, you have heard the charges that were made against you in this letter of charges and you have heard the charge made by Mr. Newbury that General Mumma stated that you and another person had repeatedly searched the official files and opened safes, and so forth, which right belonged to neither of them.

Did you do that? A. No.

Q. Did General Mumma ever make such a statement? A. No.

Mr. TOOMEY: I move that that answer be stricken, I think we have to narrow the question somewhat.

Mr. O'NEALL: In his presence.

The COURT: Just a moment. The last question and the last answer will be stricken. The jury will disregard the last question and the last answer.

Mr. Love, would you step down please a moment, and sit in one of those chairs for just a moment.

I would like to see counsel at the bench.

(The following occurred at the bench:)

The COURT: You know, ordinarily when these cases come on where they are charging libel in some letter, they produce [39] that letter and go on from there. Now, I must confess I have not seen these papers that you have put in, but I couldn't follow anything that is in this complaint from what you read and I don't believe this jury is going to get this any better than I would.

Mr. O'NEAL: I don't think there is much chance of that, either.

The COURT: The first time I heard anything about General Mumma is what you just said in asking him some question. I don't know what letter it is in.

Mr. O'NEALL: He admits making the statement, that has been stipulated to.

The COURT: You read any number of things or referred to them and I think we ought to know what it is in.

Mr. O'NEALL: Do you have that affidavit, it is September 2?

Mr. TOOMEY: I have looked high and low for it, I don't have it.

Here is the situation, I think we can clarify it for the jury this way. I think that they understand the two things that were read to them, the two letters of charges. Now, I will stipulate that the affidavit to which you are just getting——

The COURT: Before you go into that, I would like to get a little straight on this, myself. What is this statement (1) in?

Mr. O'NEALL: It is in an affidavit which he gave to the [40] Civil——

The COURT: Who gave?

Mr. O'NEALL: Mr. Newbury gave to the Civil Service Commission explaining why they fired Mr. Love.

Mr. TOOMEY: Why they suspended him.

The COURT: Where is that affidavit?

Mr. O'NEALL: It is imprinted in this next thing he wants to introduce.

Mr. TOOMEY: It is quoted in there.

• • • • •

[43] Mr. O'NEALL: Ladies and gentlemen of the jury, it is stipulated by counsel and, therefore, you may accept as a fact that the statement which was last asked or which I recently asked of the plaintiff, Mr. Love, and which attributes the following quote to the defendant was actually made by the defendant. Now, the statement is this:

"General Mumma stated that both Alexander and Love had repeatedly searched the official files of the depot and opened safes, etc., which rights belonged to neither of them." That statement was admittedly made by the defendant. It was made in an affidavit dated September 2, 1947, and it was made by the defendant Newbury to a Civil Service Commission investigator. The Civil Service investigator came to him and asked him certain questions,

he replied to those questions, [44] one of the questions was "Why did you decide to fire Mr. Love?" and in the course of his answer, that statement was made: "General Mumma stated that both Alexander and Love had repeatedly searched the official files of the Depot and opened the safes, etc., which rights belonged to neither of them."

The COURT: Ladies and gentlemen of the jury, usually at the conclusion of a case you are told that what a lawyer says is not evidence, so I want to explain to you now that it has been stipulated by the attorneys, that is the attorney for the plaintiff, Mr. Love, and the attorney for the defendant, Mr. Newbury, that Mr. Newbury did write—was it a letter?

Mr. O'NEALL: It was a signed statement.

Mr. TOOMEY: An affidavit.

The COURT: In which the defendant in this case, Mr. Newbury, said General Mumma stated that Love and another had repeatedly searched the official files of the Depot and opened safes, etc., which rights belonged to neither of them. So, that is a stipulation which you are to consider as evidence in this case.

Mr. O'NEALL: Might I mention the same would apply to the earlier two letters of charges that were read? That was also stipulated, was it not?

Mr. TOOMEY: They are in evidence also.

The COURT: No, they have been admitted in evidence, he didn't object to them, they are admitted in evidence.

Mr. O'NEALL: I thought you stipulated those were the charges and you admit they were made.

[45] Mr. TOOMEY: Yes, I do, and they are in evidence.

The COURT: Very well.

By Mr. O'NEALL:

Q. Mr. Love, I show you a photo copy of an affidavit and ask you if you can identify it? A. Yes, I can.

Mr. O'NEALL: I would like to mark this Plaintiff's Exhibit for identification. Show that to Her Honor, if you will, because I have another copy.

Deputy Clerk: Plaintiff's Exhibit No. 4 for identification.

(Affidavit of General Mumma, dated November 14, 1947 was marked Plaintiff's Exhibit No. 4 for identification.)

By Mr. O'Neall:

Q. Mr. Love, is this affidavit, do you remember when this came to your attention? A. Yes.

Q. About when did it come to your attention? A. In 1948.

Mr. O'Neall: I would like to introduce this in evidence at this time.

Mr. Toomey: I don't think it has been identified.

Mr. O'Neall: Would you identify it—it is the affidavit of General Mumma.

The Court: It is a mimeographed copy, isn't it?

Mr. O'Neall: It is a photo copy.

[46] Mr. Toomey: I object on the ground that it is hearsay, Your Honor.

Mr. O'Neall: Do you have any other, do you have the original copy of this available to you, Mr. Love, do your have it?

Mr. Toomey: I don't think you understood my objection, I am not objecting on the ground this is a copy of something else, I would object if you had the original here. I think even the original would be hearsay as to what General Mumma, who isn't here, said at some other time.

The Court: The objection is sustained.

Mr. O'Neall: I would like to ask that this be received on the ground that the statement was made to the Civil Service Commission, let me see, maybe it is in here—no, it won't be in this one.

All right, let me ask the witness those other questions.

By Mr. O'Neall:

Q. Did you discuss this matter with General Mumma? A. I did.

Q. Did a time ever come when this affidavit was discussed in the presence of Mr. Newbury? A. Yes.

Q. Was Mr. Newbury ever interrogated with respect to this affidavit? A. Yes.

Q. When and where? [47] A. Civil Service Commission.

Q. About when? A. In 1948, the last week in February.

Q. And to your knowledge, this affidavit was discussed by Mr.—I mean this particular affidavit was made known to Mr. Newbury at that time? A. It was.

Mr. O'NEALL: I again ask that this be received in evidence on the ground that the defendant is fully aware of what it contains, the affidavit will speak for itself, it certainly is important and should be received on the ground that it will allow the jury to see what General Mumma, who is quoted by the defendant, what General Mumma had to say on the subject.

Mr. TOOMEY: The same objection, General Mumma is not here for cross-examination.

The COURT: I will have to sustain the objection because it is hearsay.

• • • • •

[51] Q. Now, then, did a time come when you consulted an attorney here in Washington? A. Yes.

Q. About this case? A. Yes.

Q. That was before you brought this action? A. Yes.

Q. Who was the attorney you consulted? [52] A. Harry Maginnis.

• • • • •

Q. Why did you happen to go see Mr. Maginnis? A. I saw a write-up in a Chicago paper of a case he handled similar to this, in the agency in which I was, involving two girls and involving the defendant here.

Q. And what case was that? A. It was the case of Deak and Patton v. Pace, the Secretary of the Army.

Q. As a result of his success in that litigation, you called on Mr. Maginnis here in Washington? A. I did.

Q. Did you arrange for him to take your case? A. I tried to, I did not arrange for him to take the case other than he

took it temporarily for the purpose of doing something for me.

Q. How do you mean he took it temporarily? A. Well, he took the file and proceeded to look it over, that I had with me.

[53] Q. You handed him the file and the summary? A. Yes.

Q. Now, then, while you were talking to him, did a time come when Mr. Maginnis talked with the defendant? A. Yes.

• • • • •

Q. How do you know he talked to him? A. He called him on the phone.

Q. Did you hear him make the phone call? A. Yes, I was sitting right beside him.

• • • • •

[54] By Mr. O'Neall:

Q. Did you hear Mr. Maginnis ask to speak to Mr. Newbury?

Mr. Toomey: I object, it is hearsay, Your Honor.

Mr. O'Neall: That is permissible.

Mr. Toomey: I do not think it is permissible.

The Court: The objection is overruled.

The Witness: I did.

By Mr. O'Neall:

Q. Were you so situated in that room as to hear what was said on both ends of that telephone conversation? A. I was sitting immediately across the desk and I could hear everything that was said on both ends.

Q. Was there more than one telephone in that room and, if so, what was the relationship between them? A. There was an extension, I was sitting right at the extension which is on the other side of the desk from Mr. Maginnis.

The Court: Just a minute, you mean that you had your ear to the extension?

The WITNESS: Not right at the time of the call, but at the time he was talking, I did; I was sitting so close to the phone, there was another phone, and toward the conclusion of it, I could hear everything, all throughout.

[55] The COURT: I was trying to find out whether you heard it through the extension, or you were saying you heard it through the phone which Mr. Maginnis was using?

The WITNESS: Primarily, yes, until I took up the extension, sitting so close to the phone that Mr. Maginnis was holding in his hand, that is correct.

By Mr. O'NEALL:

Q. That was you later, during the course of the conversation, do I understand your testimony, during the course of the conversation you picked up the extension? A. Yes, I did.

Q. I don't want to suggest that to you, I want that to be your testimony. A. I did.

* * * * *

[56] By Mr. O'NEALL:

Q. Was the defendant on the telephone? A. It was his voice I heard.

Q. That was Mr. Newbury? A. Mr. Newbury's voice.

Q. And you heard it over the phone? A. Yes sir.

Q. You heard him speaking to Mr. Maginnis? A. Yes.

Q. And what was it, under those circumstances and while you were listening to the defendant himself speak, what was it the defendant said?

Mr. TOOMEY: Just a moment, please. I don't want to be obstreperous but I wonder if I might ask several questions. I don't think we have sufficient identification of the voice at [57] the other end of the line.

The COURT: Yes, you may ask him questions.

By Mr. Toomey:

Q. Mr. Love, how many times have you talked to Mr. Newbury? A. Well, I talked two whole days to him.

Q. When was that? A. In 1948.

Q. 1948. After 1948, when was the next time you talked to him? A. I don't think any other time except this Maginnis time.

Q. You didn't talk to him at all between 1948 and this incident that you are discussing now? A. Well, I had heard his voice in 1947.

Q. In 1947. Had you ever talked to him on the telephone? A. I had heard his conversation on the phone at Jeffersonville in 1947 and only directly in the Civil Service Commission in 1948.

Q. But in spite of the fact that you had heard his voice—let me ask you this, how many times do you think you talked to him on the phone from Jeffersonville? A. Oh, I never opened my mouth from Jeffersonville but I heard him talking.

Q. Over the telephone? A. Yes.

Q. Under what circumstances? A. He was calling or Alexander was calling.

[58] Q. Calling whom? A. Newbury or somebody in that office.

Q. Who was Newbury calling? A. Alexander was doing the calling.

Q. And you heard those conversations? A. In my office at Jeffersonville over the phone.

Q. You were on the telephone, too. A. Yes, an extension just like the other case.

Q. How often do you suppose that happened? A. I wouldn't say it happened but once in my recollection, it might have been oftener.

Q. From 1947—by the way, when was this call put from Mr. Maginnis' office? A. In 1952.

Q. In 1952. Can you fix what month in 1952? A. Yes, I have it in these interrogatories that I have answered,

from memory, I think my statement in there is more accurate than I can give it now.

Q. Let that go for the moment, it isn't important for these purposes, so that from 1947 until 1952, you talked to the defendant on the telephone once and you talked to him in person on the occasion of the hearings in 1948, is that right? A. That is right.

Q. And those were your only conversations with this defendant? A. I would say that is substantially correct.

[59] Q. Now, when you were in Mr. Maginnis' office when this phone call was supposed to have been made, you didn't hear the voice on the other end of the line identify himself, did you? A. Yes, and I heard Mr. Maginnis repeat it.

Q. I am not asking what you heard Mr. Maginnis say. Tell us the office setup in Mr. Maginnis' office, I want to know more about the arrangement of the desks and telephones and where you were seated; if you will just go ahead on your own, I won't interrupt. A. Mr. Maginnis was sitting with his back more or less toward the far wall from the street. The building was on F Street, I think, and I was sitting across from Mr. Maginnis' desk or a little on the side so I could talk to him, he had the papers right there, he was reading from the papers as he called Mr. Newbury. So, I was close to him.

Q. You were across the desk from him, is that it? A. Toward the side.

Q. Now, the telephone; how far do you suppose you were from him, first of all. A. Oh, I would say three feet at the most.

Q. And the telephone, there were two phones on his desk? A. No, there was a phone on the side, as I recall it, on my left and Mr. Maginnis' right and Mr. Maginnis had a phone, I couldn't say exactly where but I presume it was sitting on his desk at the moment.

Q. So, he was using one telephone, and there was another [60] one near you? A. That is right.

Q. Within arm's reach? A. Oh, yes.

Q. Now, you testified that you didn't pick up that sec-

ond telephone, the one close to you, until after the call had been completed? A. That is right.

Q. Is that right? A. Oh, yes; yes, that is correct.

By Mr. O'NEALL:

Q. What do you mean by the call being completed? A. I knew Mr. Maginnis was making the call to get Gravelly Point.

Q. You mean the connection made; you don't mean the conversation? A. No.

By Mr. TOOMEY:

Q. You didn't pick up the phone in the middle of the conversation? A. Well, it was toward the end.

Q. Toward the end of the conversation? A. Yes, that is correct.

Mr. TOOMEY: Your Honor, I suggest he has not identified the voice on the other end of the line, and that testimony is inadmissible.

[61] The COURT: He has already said he identified the voice, he said he had.

Mr. TOOMEY: I suggest he is incapable of making it.

The COURT: That is for the jury to determine. I overrule the objection.

By Mr. O'NEALL:

Q. What did you hear Mr. Newbury say at that time? A. He answered "Yes" first which was to Mr. Maginnis' question.

Q. What did he mean by that answer of "yes"?

Mr. TOOMEY: I object, Your Honor.

By Mr. O'NEALL:

Q. What else did you hear? A. He followed "yes" with a statement that Love had been fired on charges and that the charges were that he had, he Love, had taken papers out of the files at Jeffersonville, Indiana, Quartermaster

Depot and given them to Senator Capehart without authority.

Q. Anything else on that? A. And that he had been found guilty of that by the Civil Service Commission, and other charges.

Q. Do you recall anything else said by Mr. Newbury at that time, and, if so, what? A. He replied to a statement of Mr. Maginnis that he had an affidavit, not an affidavit, but I had exhibited to Mr. Maginnis a statement——

[62] The Court: Mr. Love, would you mind taking your hand down from your face, I think it keeps your voice from carrying, it is hard to follow you. Would you begin that answer again?

The Witness: Mr. Maginnis had interjected there to him that he had in front of him, Maginnis had in front of him, a letter, a copy of a letter of Senator Capehart which I had furnished Mr. Maginnis, that stated no papers were ever delivered to Senator Capehart by Love, and would he explain that and Mr. Newbury said, "yes," said "regardless" and got a little sore and didn't add to it any at all.

The Court: Will you read the last part of that answer?

(The answer was read.)

By Mr. O'Neall:

Q. Was there any further comment from Mr. Newbury at that time concerning any charge that had been made against you, that you heard? A. On the phone?

Q. On the phone. Remember you cannot testify as to except when you were on the extension, when you, yourself, were listening. A. He said something about the Deak case, but not about the charges against me, to Mr. Maginnis, he mentioned The Deak and Patton case and Mr. Maginnis and he had an extensive conversation about it; about that time I took the phone up, the extension.

Q. All right, sir. Now you don't recall anything else at [63] that time? A. I do not.

Q. Do you recall, you know that you were on the phone and you knew that you recognized Mr. Newbury's voice in

the early part of the conversation; what practice was followed by Mr. Newbury in talking to—by Mr. Maginnis in talking to Mr. Newbury? A. He stated why he was calling him.

Q. I know, but I mean when Mr. Newbury responded, what did Mr. Maginnis do? A. He said Love was in his office.

Mr. TOOMEY: I object, not what Mr. Maginnis said, please.

By Mr. O'NEALL:

Q. What did Mr. Maginnis say—first, Mr. Maginnis picked up the phone and he called Mr. Newbury, asked for Mr. Newbury and spoke to him? A. He called Gravelly Point and asked for his extension.

Q. You already testified, later during the course of that conversation, you were on the wire and recognized Mr. Newbury's voice. Now, then, Mr. Maginnis would ask a question over the phone, he would hear an answer, then what did he do before he asked his next question? A. He still sat there holding the phone.

Q. All right. Did you have any reason to believe that any other matters were discussed concerning charges made by Mr. Newbury against you? [64] A. At that time?

Q. At that time. A. No.

• • • • •

[68] The COURT: What about that date that he was going to give us of this telephone conversation he testified to?

Mr. O'NEALL: You mean between Mr. Maginnis and Mr. Newbury?

The COURT: Yes.

By Mr. O'NEALL:

Q. About what was the date of that? [69] A. My best recollection, it was June 1948.

Q. The conversation between the attorney Maginnis and Mr. Newbury, what year and what month? A. June 1952,

pardon me, I am getting twisted on my years here, it was 1952.

Q. What year? A. 1952.

Q. And the month? A. It was June. It was not 1948.

* * * * *

CROSS-EXAMINATION.

By Mr. TOOMEY:

Q. How are you so sure it was June of 1952, Mr. Love, that you talked to Mr. Maginnis? A. Because I testified under oath in this case and filed interrogatories and, at that time, I looked up my trips to Washington, D. C., and the fact that I came by bus down here and in June and May, I came down in 1948 twice, and checked on the times I visited, stayed with my daughter who lives in this area. And then I answered that statement, the question, when did that occur, because I think it was an answer to some of your interrogatories and, at that time I refreshed by record [70] and recollection and it was June and it still remains in my memory as June 1952.

Q. Now, Is it my understanding that you came to see Mr. Maginnis after the decision in the Deak and Patton case, is that correct? A. It was after the decision in the Court of Appeals, I am sure, because they lost in the Lower Court, the Deak and Patton girls, they were in the same agency I was in and they won or got it reversed in the Circuit Court here and I read it in the paper in Chicago, so it must have been after they had won their case because it stated the amount and everything.

Q. Why was it you went to see Mr. Maginnis? A. For that very reason, that he had handled that case and it was very similar to mine in the Civil Service aspects of it and Mr. Newbury, the defendant here, was involved as Personnel Officer of that Agency, that is, he was the Personnel Officer of the Agency. Now, I do understand, because I knew that fact, I worked under him, too, John Martin had signed the discharge papers of the Deak girls or their

charges or what have you, and I didn't know too much about what Mr. Newbury had to do with it, but I did learn when I saw Mr. Maginnis that he had some connection with it, through Mr. Maginnis.

Q. You wanted Mr. Maginnis to represent you in connection with your dispute with the Civil Service Commission, is that right? A. Yes.

[71] Q. Now, when you were in his office, in June; by the way you can't pin it down any closer than June, can you? A. I couldn't give you the day. I might be able to give you the time of day because of the fact Mr. Maginnis was sick.

Q. Let's forget that at the moment. When you went in to see him, was the telephone call, how did you happen to make this telephone call that you told us about. A. We had a prior discussion that caused him to refer to Mr. Newbury.

Q. And you asked him to call Mr. Newbury? A. No, he asked me should he call Mr. Newbury to see what he could do for me.

Q. And you said, "Sure, go ahead"? A. Yes.

Q. So that he was calling as your representative?

Mr. O'Neall: I object to that, Your Honor, that is trying to get this witness to draw a conclusion. The witness has already testified that Mr. Maginnis asked if it would be all right with him if he called over to see what he could find out from a conversation with Mr. Newbury, and if counsel wishes later to contend that that constitutes an appointment of attorney or something like that, I think he is free to do so as argument, but I don't think he should ask the witness that question.

The Court: The objection is sustained.

* * * * *

[74] REDIRECT EXAMINATION.

By Mr. O'NEALL:

Q. Mr. Love, you were asked by Mr. Toomey why you went to see Mr. Maginnis and you stated to Mr. Toomey, in response to his question, that you went to see him in order to get him to take your case. Now, in order that there may be no improper emphasis drawn from the fact that he didn't, would you state why he didn't take your case? A. He wouldn't take it because he had one thousand such cases, he said, and couldn't possibly take mine.

Q. But he did, after talking with you, volunteer to phone up Mr. Newbury and talk to him about your matter? A. He said he'd see what he could do for me.

Q. At that time, had you retained him as your attorney? A. No.

Q. As a matter of fact, you never did retain him as your attorney? A. I never did.

• • • • • •

[97] ARTHUR W. NEWBURY the defendant, called as a witness by the plaintiff, being first duly sworn, was examined and testified as follows:

• • • • • •

[98] By Mr. O'NEALL: Your letter of July 11, 1947 made certain charges against the plaintiff, is that correct? A. That is correct.

Q. Do you recall that the letter of July 11 referred to a letter from the plaintiff or signed by the plaintiff, dated June 11, 1947? A. I think it is a matter of record, I don't recall it.

[99] Q. Did you, at the time, have the letter on which the charges were based in front of you? A. I did.

Q. Did it occur to you that that letter was or might have been written pursuant to grievance regulations of the Army Department? A. I don't understand counsel's question.

Q. Did you know—let me put it to you this way, did you

know that that letter had been written under grievance procedures authorized by the War Department in 1947? A. I did not.

Q. Did you know the War Department had provisions authorizing and allowing employees to file grievances? A. I most certainly did.

Q. You did? A. That is right.

Q. What was the policy of the War Department with respect to those grievances? A. I think it may be well to note one thing, in answering your question, counsel, that at the time that grievance was filed, it was filed under a Quartermaster Policy and I was Finance, and I did not know or was not aware of that particular paper until I saw it this morning in court.

Q. All right, sir. Did you make an effort at that time to find out what regulations were applicable to the person you were accusing? [100] A. Not knowing that there was anything in question, no.

Q. You just knew that you didn't know what they were? A. I beg your pardon?

Q. You knew, though, that you didn't know what regulations were applicable? A. I beg your pardon, I did not say that.

Q. What did you say? A. I said I did not know he had filed a grievance.

Q. Did it occur to you that this might have been a grievance? A. No.

Q. Did it look like a grievance? A. I didn't see the letter.

Q. Of June 11, 1947? A. I did not see the letter of the plaintiff of June 11.

Q. You didn't see that? A. I still haven't seen it.

Q. But that was the letter on which you relied at the time you made these charges? A. It was not the letter on which I made charges. I made charges on the letter of management officials of his office.

Q. Now, your letter charges, of July 11, 1947, states:

"These charges are evidenced by letter dated June 11, 1947, bearing signature of Harold R. Love."

that is in your letter, do you recall that? A. I most certainly do.

[101] Q. You signed this letter of charges? A. How many letters could have been written on July 11?

Q. It goes on and further identifies it by saying that it was addressed to the Chief, Industrial Audit Division, and so forth and so on, it gives further identification. What I am asking you is, did you have before you, had you at that time seen the letter of June 11, 1947? A. I had not, I had the letter from the management official in which he quoted that this letter was part of the charges and I acted upon that as a matter of charges. I did not see the original document.

Q. In other words, these charges were not evidenced to your knowledge by the letter of June 11, 1947? A. They were evidenced, to my knowledge.

Q. How was your knowledge of that, if you hadn't ever seen it? A. Because they were quoted to me and it is a matter of record, they are all in the record.

Q. You say you haven't until this day seen it? A. I have not seen the letter. I have had quotes from the letter and I think it is perfectly permissible for an official to accept another official's statement.

Q. In other words, your statement here, "These charges are evidenced by letter dated June 11, 1947,"—let me ask you this with reference to those words, would it have been more [102] accurate or would it have been only accurate if you had said, "These charges are evidenced by a letter dated some other date from some other person, quoting a letter from you," is that correct? A. I don't know what you are particularly driving at, I don't understand the question.

Q. What I am driving at is this; I think that the point is clear, let me go on to another question.

. . . . . .

[103] CROSS-EXAMINATION.

By Mr. TOOMEY:

Q. In July of 1947, Mr. Newbury, what was your official position? A. Chief, Civilian Personnel Branch of the Management Division of the War Department, Finance Corps.

Q. What were your duties? [104] A. My duties at that time were to administer the civilian personnel program of the office of Chief of Finance, Army Audit Agency, and its Class 2 activities or its field stations.

* * * * * *

[105] Mr. TOOMEY: As I stated at the bench, the defendant at this time moves the Court to direct the jury to enter a verdict in defendant's favor.

Now, as I see it, in the case there are three alleged defamatory publications, or four, actually. One is the letter of July, 1947, signed by the defendant. The second is the letter of July 18, 1947. The third is the defendant's affidavit of September 2, 1947.

The COURT: Does this item No. (7) in the plaintiff's complaint, does it group the letter of July 18 and the affidavit of September 2?

Mr. TOOMEY: Yes, it does, Your Honor. I think counsel concedes that. Paragraph 2 (7), Mr. O'Neall, is a composite of those two letters.

Mr. O'NEALL: July 11 and July 18; and I think the [106] affidavit of September 2 is in point (1) of paragraph 2.

Mr. TOOMEY: Yes.

Mr. O'NEALL: That is the one where he quotes General Mumma, General Mumma said.

The COURT: Isn't it the defendant's letter of July 11, 1947, that is referred to in (1)?

Mr. TOOMEY: No, Your Honor, that is the affidavit of the 2d of September, and the item No. (7) in paragraph 2 of the complaint is a composite of the letters of 11 July and 18 July.

Mr. O'NEALL: That is correct.

The COURT: Well, I understood just a moment ago that the defendant's affidavit of September 2d and the defendant's letter of July 18 were what were grouped together for No. (7).

Mr. TOOMEY: I misunderstood Your Honor. What is grouped in (7) are the two letters, 11 July and 18 July.

The COURT: Well, then, what is in No. (1)?

Mr. TOOMEY: No. (1) is this affidavit of September 2, 1947, given by Mr. Newbury to the Civil Service Investigator and containing the quotation of General Mumma.

Mr. O'NEALL: The only point, just while we are getting this cleared up, I don't believe there is any affidavit of September 2 before the jury. The only thing before the jury or on the record now is the fact that it is admitted that the [107] defendant made that statement.

Mr. TOOMEY: I think there was a stipulation it was contained in an affidavit made to the Civil Service Commission.

Mr. O'NEALL: I don't think so.

Mr. TOOMEY: If there is any dispute about that, I don't think there should be——

Mr. O'NEALL: I am not disputing, I just don't recall that was a stipulation.

Mr. TOOMEY: I think it was; well, in any event, those are the facts. Then we come, Your Honor, to one more alleged publication, that being the——

The COURT: In this plaintiff's complaint, he doesn't tell you where he gets that from.

Mr. TOOMEY: That is certainly true, Your Honor.

The COURT: Is it conceded, Mr. O'Neall, that this statement in no. (1) is in an affidivit of September 2, 1947, that the defendant gave to the Civil Service Commission, is that correct?

Mr. O'NEALL: Your Honor, let me verify that with my client.

Your Honor, this is correct. That is included in an affidavit.

Mr. TOOMEY: That is the total of the affidavit?

Mr. O'NEALL: In the affidavit, this is an affidavit of September 2 which includes that statement in (1).

[108] The COURT: All I am trying to find out is merely whether or not this statement he has outlined here under (1), what it comes from.

Mr. O'NEALL: An affidivit of September 2, 1947, executed by (pointing to defendant).

The COURT: You say it is not in evidence?

Mr. TOOMEY: We didn't have it specifically and we entered into a stipulation which was stated to the jury.

Mr. O'NEALL: The stipulation was he admitted making the statement.

The Court: Now, this no. (7), is it your understanding that that incorporates two letters, one of July 11, and one of July 18?

Mr. O'NEALL: 1947.

The COURT: Written by the defendant.

Mr. O'NEALL: And it is a rather inexact composite, what we have done was to introduce those two letters to further amplify paragraph (7).

The COURT: And those two letters are in evidence?

Mr. TOOMEY: They are in evidence.

The COURT: What are the numbers there?

Mr. O'NEALL: No. 1 and No. 2.

The COURT: No. 1 and 2 for these letters.

Mr. O'NEALL: Yes, plaintiff's No. 1 and No. 2.

Mr. TOOMEY: Now, then, Your Honor, so we have as I say [109] the publication of 11 July 1947, the publication of the 18th of July, 1947, the affidavit of September 2, 1947, and finally the alleged telephone conversation between the defendant and one Mr. Maginnis, an attorney, which according to the plaintiff's testimony took place during June of 1952.

Now, I would like to address myself first to the first three publications, the 11th of July, the 18th of July, and the 2nd of September, 1947. I think clearly in so far as those three publications are concerned, the defendant is entitled to a directed verdict for two reasons: In the first place, the defendant is not liable for those statements in as much as

it is uncontradicted that they were made by the defendant in the exercise of his functions as the Civilian Personnel Officer of the Finance Department and that, therefore, he is immune from suit for such publications.

The classic case on that is, of course, Cooper v. O'Connor, decided by our own Court of Appeals in 1938, it being found in 69 App. D.C., page 100. Now, while that case did not deal with libel, it was an action for malicious prosecution, another of these intentional torts, and was brought against quite a large group of people running from the deputy controller of the currency down to Mr. Rover, who was at that time serving his first term as United States Attorney and I believe even including an assistant United States Attorney. There were around twelve defendants of varying degrees of importance. The Court of Appeals said as follows: —

[110] The COURT: What about the statute of limitations?

Mr. TOOMEY: I was going to come to that second, Your Honor. If you would prefer I take that up first, I will. It is perfectly evident, of course, they cannot recover for the publications back in 1947; the statute of limitations here is, of course, one year.

. . . . . .

[114] Now, obviously, if there was a telephone conversation between Mr. Newbury and Mr. Maginnis in June of 1952, such conversation would not be barred by the Statute of Limitations and I cannot urge the Statute of Limitations there for the basis of a directed verdict on that particular alleged publication. However, I believe that I have a sound basis for urging a directed verdict regardless of the Statute of Limitations, for two reasons. I will take what is perhaps the secondary, first. [115] I might point out that we are bound by Virginia Law in so far as the substantive rules of law are involved here, in as much as the alleged libels were published at Gravelly Point over in Virginia across the line, across the river. However, it makes no difference in as much as, having checked it, I find the Vir-

ginia Law on all these points is identical to our own. We take the position with reference to this alleged telephone call that, viewing the evidence most favorably to the plaintiff, the occasion upon which the conversation was had was at least a qualifiedly privileged occasion.

Now, I say that for this reason, that by the plaintiff's own testimony, Mr. Maginnis called Mr. Newbury, as I view it, in a representative capacity. I admit and I realize, when I put that particular question to Mr. Love on the stand, Your Honor ruled that it was an objectionable question because it asked him to draw a conclusion; however, we are entitled to draw our conclusions from the testimony which he gave. It is perfectly evident that Mr. Maginnis, if he called Mr. Newbury, called him up as the Director of Civilian Personnel of the Army Audit Agency to see what he could do about Mr. Love's problems, that is Mr. Love's own testimony. Therefore, it is perfectly evident that he was calling in a representative capacity about a matter which concerned both of them, it concerned Mr. Newbury obviously, he having been the person who signed the letters of charges and made the affidavit; it concerned Mr. Maginnis because [116] he was calling as a representative of Mr. Love.

The COURT: There is a conflict of authority on that point, isn't there?

Mr. TOOMEY: I am not sure that I know what conflict Your Honor——

The COURT: Well, now, you are claiming, if I understand you, that whatever was said in the telephone conversation would be qualifiedly privileged because you say that the person that made the call was acting at least as an agent, shall we say, if he wasn't his attorney, he was certainly his agent.

Mr. TOOMEY: Yes, in a representative capacity.

The COURT: But I think the Restatement says that publication, if made even to the agent of the party defamed, is defamatory.

Mr. TOOMEY: It may be defamatory, Your Honor, but there is still the problem of whether or not the occasion

itself is qualifiedly privileged, that doesn't mean the defendant can automatically get off.

The Court: Oh, yes, I understand what you mean.

Mr. O'Neall: Would it be helpful if I mentioned the other case here?

Mr. Toomey: I'd just as soon, if I might, go ahead.

Whether there is conflict or not, the law of Virginia and the law of the District of Columbia, I think, are well established that that does give rise to a qualifiedly privileged occasion.

[117] The Court: What do you rely upon for the District of Columbia?

Mr. Toomey: For Virginia law, Your Honor, I rely on the case of—if Your Honor will indulge me, here it is, the People's Life Insurance Company of Washington, D. C. v. Talley.

The Court: What is that?

Mr. Toomey: People's Life Insurance Company of Washington, D. C. v. Talley, the Supreme Court of Virginia, 166 Va. 464, in which case they quoted with approval the case of our own Court of Appeals entitled National Disabled Soldiers League v. Haan, 4 F. 2d 436.

The Court: That went off on the rights of some Member of Congress, didn't it?

Mr. Toomey: Well, but the thing that is significant in that case, Your Honor, is the Court of Appeals' emphasis upon the fact that the Member of Congress had called up as a representative of the individual or of the organization, rather, claiming to have been defamed. In other words, they didn't rely solely upon the fact that it was a Member of Congress. As a matter of fact in the case of Mateo v. Barr, which I tried here just several weeks ago, Judge Holtzoff ruled that merely because a Member of Congress manifests an interest in the case doesn't necessarily give rise to a qualifiedly privileged occasion and he ruled against me on that point, where in that case there had been a manifestation by Senator Williams of Delaware in the subject matter of the defamatory comment.

[118] The Court: What did the Virginia Court hold?

Mr. Toomey: The Virginia Court held that, first they held for a qualifiedly privileged occasion. It was not precisely the same factual situation in this case, the reason I mention it is that there they quoted with approval our Court of Appeals' decision where we do have, I feel, an analogous factual situation and in that case the Supreme Court of Virginia quoted the usual references and said as follows:

> "A privileged communication is one made in good faith upon any subject matter in which the party communicating has an interest or in reference to which he has or honestly believes he has a duty to a person having a corresponding interest or duty and which contains matter which, without the occasion upon which it is made, would be defamatory and actionable."

I think that is precisely what we have here and, as in the National Soldiers League v. Haan case, we have the person to whom the allegedly defamatory publication is made calling up in a representative capacity upon behalf of Mr. Love, and I think that it follows necessarily that it is a qualifiedly privileged occasion.

Now, going from that to the next question with reference to this alleged telephone call, the mere existence of a qualifiedly privileged occasion, of course, does not automatically entitle us to a directed verdict.

[119] The Court: I suppose you are claiming, then, that actual malice would have to be shown?

Mr. Toomey: It would have to be shown and both the Supreme Court of Virginia and our own Court of Appeals in the two cases to which I have already made reference, held that where the evidence is as consistent with the nonexistence of malice as with its existence, then there is no question for the jury where you have a qualified privilege, of course, and the Court is under a duty to direct a verdict for the defendant in that situation.

I think it is perfectly clear in this case that there is absolutely no evidence upon which a jury could reasonably

find actual or expressed malice and even if so, how you could pick out portions of the evidence and say, well, maybe they found malice on the basis of this, all of the evidence is at least as consistent with the nonexistence of malice as with its presence.

The COURT: That would be a question for the jury.

Mr. TOOMEY: No, Your Honor. First of all, Your Honor has to rule on whether or not they have made a prima facie case of malice and if the evidence is as consistent with the nonexistence of it as with its existence, then they have failed to make a prima facie case and they are not entitled to go to the jury on that question. So, we submit that on that basis, we are entitled to a directed verdict as to the alleged June 1952 publication.

[120] Mr. TOOMEY: I think there is another possible theory upon which we are entitled to such a verdict and that is that we are entitled to it upon the same ground as we are with reference to the first three, to wit, what I started to talk about, the absolute immunity. Once, again, we have to look at the circumstances under which Mr. Newbury is alleged to have said anything about Mr. Love over the telephone. He was being called by Mr. Maginnis.

The COURT: Was he still in the same position?

Mr. TOOMEY: He was and he is to this day, Your Honor. He was being called as the Chief of Civilian Personnel of that particular agency.

The COURT: Do I understand that the defendant concedes there was a telephone conversation?

Mr. TOOMEY: No, we do not, but we are arguing this upon the assumption that they have made at least enough to go to a jury on the issue. We do not concede it for a moment, but we have to take on this motion, at least we have to take the evidence in a view most favorable to the plaintiff; so taking that view of the evidence, his testimony is that Mr. Maginnis called up Mr. Newbury in his office as Chief of Civilian Personnel, the position he held back in 1947, the same one he holds today, to find out what could be done about this case, what is it all about, as I understand the testimony. He called up to see if he could do

anything about it. Now, anything that Mr. Newbury said in response to such an official call, and [121] that is certainly what it was, was done within the scope of his official duties and under color of his office. Obviously, as a private citizen, Mr. Newbury couldn't do anything about Mr. Love's problem, it would only be as the Chief of Civilian Personnel that he could do something about it; therefore, what he said upon such a telephone call was certainly said within the scope of his duties and under color of his office.

Now, to emphasize that point, I feel that we should recall the language of the Court of Appeals in Cooper v. O'Connor, wherein they said as follows:

> "It is not necessary in order that acts may be done within the scope of the official authority that they should be prescribed by statutes or even that they should be specifically directed or requested by a superior officer. It is sufficient if they are done by an officer in relation"—and that is italicized by the Court of Appeals—"in relation to matters committed by law to his control or supervision"—citing cases—"or that they have"—and underlined again—"more or less connection with the general matters committed by law to his control or supervision or that they are governed by a lawful requirement of the department under whose authority the officer is acting."

Which obviously doesn't cover this telephone call, but the point is that with that broad definition by our Court of Appeals and that case, by the way, has been followed by the [122] Supreme Court of Virginia also, I will have to get that for you, Your Honor, I don't have it at the moment, with that broad definition, the Supreme Court of Virginia following the Cooper case in Sayers v. Bullar, 180 Virginia 222, at page 230; therefore, it appears to us that this telephone call, if there was such a telephone call, was probably made—the conversation was probably had by Mr. Newbury within the scope of his official authority, clearly was, and therefore the absolute immunity of the Cooper case would apply.

Certainly, his telephone conversation was in relation to matters committed by law to his control or supervision; certainly it had more or less connection with the general matters committed by law to his control or supervision, those being the criteria.

Accordingly, just to sum it all up, with reference to the alleged telephone conversation, we say the defendant was absolutely immune or if he was not absolutely immune, he made the conversation upon the qualifiedly privileged occasion; that being the case, the onus is upon the plaintiff to prove malice. He failed to prove any kind of malice, the evidence at least is as consistent with the nonexistence of malice as will its existence and, therefore, on those two grounds alone, we are entitled to a directed verdict with respect to the alleged June conversation, June 1952.

With respect to the publications back in 1947, obviously they are barred by the Statute of Limitations, and second, [123] equally obviously, the defendant is immune from suit for them by virtue of the Cooper v. O'Connor doctrine and accordingly, we think on all issues we are entitled to a directed verdict, certainly at least on the first three alleged publications.

Mr. O'NEALL: May it please the Court, in Steamboat Company v. Davis, a decision of our Court of Appeals, found at 12 App. D.C. 306, Norfolk and Washington Steamship Company v. Davis, I believe that case was decided in—well, I don't have it here, decided March 1898. In that case the very question of privilege that my worthy opponent has just discussed was brought up before our Court of Appeals. They held very clearly that where a person called, in order to get information because they were interested in the person who had been defamed, that there was no privilege which covered the original defamator in repeating the statement to such person, . . .

. . . . . .

[124] That is the only difference, but when we go in that case and this, now here there is the further—in the Ashford v. Evening Star decision by Justice Van Orsdale,

which rather clearly presents the basis on which privilege, qualified and conditional privilege, rests, that case is reported in 41 App. D.C. beginning at page 395 and the part that I think is particularly interesting at this moment is found on page 403, * * *

* * * * *

[125] If we had to go to actual malice, we certainly would gladly assume that burden. But there are certain very important facts that you get from the Ashford case. First of all, here we have at most a qualified privilege, this qualified privilege can last and be of value to this defendant, if, and only if, the statements made were true or substantially true and made in good faith, the two must go together. Now, we have no plea from them this time that the statements are even true. At a proper time, I am going to ask Your Honor for an instruction to this jury to the effect that they are entitled to assume that the statements are in fact not true, the statements of which we complain, because from the pre-trial conference to [126] this moment, we have nothing to tell us that they are going to undertake to prove the truth of the statements made by the defendant.

So, the first requriement of a defense is truth, if you are going to rely on conditional privilege. If you are going to rely on absolute privilege, that is something else, but if it is conditional privilege, the defendant has got to come forward and show that he made a statement which was substantially true. The only evidence before this Court today is the statements were false and I think the jury has a pretty solid impression on that subject, I may be wrong, but at least we hope so and I believe they are satisfied that the statements made were false in fact.

Now, then, we come to another point also found in the Ashford case; that is, that when you get around to malice, you can find malice right in the language of the defamation.

The Court: What about this claim of the Statute of Limitations as to these earlier ones?

Mr. O'Neall: Well, Your Honor, on that subject our

point is that we can't do anything about that calendar, and so far as the views quoted from the jurisdiction of Colorado and New York, two very respectable jurisdictions, if the Court follows that rule here, why, we have nothing to prevent the running of the Statute because, as I recall the testimony of the plaintiff, he did not recall any statement on the subject [127] of the contents of those first two letters over the phone.

If I am wrong on that, you can correct me now. As I recall the testimony of the plaintiff, over the phone, what he heard was reference to the statement about General Mumma and what General Mumma had said.

Mr. Love: That is correct.

Mr. O'Neall: As I recall, he didn't hear anything about the letters of July 11, 1947, and July 18, 1947, so I would say as to those, the Statute of Limitations, I believe, should be deemed to have run unless the Court would accept our theory of republication, or there is only one other point I have and that is to grant us alternative relief.

I would like to explain those points this way, the defamatory statements in this instance were made and put in an official record. I grant that there is no distinction between putting it on a death certificate as was done in Colorado and here, both are public records, both are sources which will be consulted; there is only one difference, here the man's very employment center where anyone who wanted to employ him would have to go, contains these defamatory statements. To leave that there uncorrected, unmodified and unchanged, although not true, in my opinion does necessarily constitute a republication.

The Court: Well, there never would be any Statute of Limitations to any libel if the fact that they remained in [128] the record that people could see, there never would be a statute of limitations——

Mr. O'Neall: Let me put it this way, the man who had made the defamatory remarks and put them in a record knowing that the record is one where people are required to consult it, as is the case with Civil Service records, he is not entitled to a statute of limitations. But he has one

protection, he can retract, he can modify, he can qualify his statement; that is what this defendant has not done. It isn't as if, by recognizing this principle, we are going to leave a man in an exposed position, or that we are going to help him in any way. I think all people agree the reason for a statute of limitations is to get the case tried at a reasonable time while we can still measure the effect.

The COURT: Whatever the reason is, the Court has to apply it.

Mr. O'NEALL: I agree, Your Honor. Our only thought is here in this case, if the Court were to find that the statute of limitations must be deemed to have run to the matters in point sub-paragraph (7), paragraph 2 of the complaint, if that is the feeling of the Court, it would certainly be based on very respectable legal theory, we would say.

The COURT: Why do you attempt to distinguish between what is said in (1) and what is said in (7)?

Mr. O'NEALL: Well, what was said in (1) was repeated over [129] the phone within one year prior to the bringing of the action.

The COURT: Yes, but it is libel that you are relying upon in (1) and (7), and it is slander that you are relying upon in the other.

Mr. O'NEALL: That would be a slanderous republication of the libel.

The COURT: As I recall the plaintiff's testimony, what he said was that the defendant said Love had been fired on charges and that the charges were that he, Love, had taken papers out of the files at the Jeffersonville, Indiana, Quartermaster Depot and given them to Senator Capehart without authority, and that he had been found guilty of that by the Civil Service Commission, and other charges.

Now, that seems just a little bit different from——

Mr. O'NEALL: Well, if we could, we would like to expand that statement of other charges to include the first one, I mean the ones that appear in (7), but I think that would be going a step too far.

The COURT: You have already closed your case.

Mr. O'NEALL: Yes, I don't mean that, I mean by argument.

The COURT: Have you any authority for that proposition that you are claiming for, that this oral statement would reactivate this libel against which the Statute of Limitations had run?

Mr. O'NEALL: No, Your Honor, I don't think I do have [130] anything on that, but I will be very happy to find that for you very quickly, because I think it is clear republication of the original libel and, in any event, we have given them notice by answers to their own interrogatories concerning the republication, and they know and they have had notice for some while that we were going to prove this point.

The COURT: Of course, this idea of republication that you have doesn't take into consideration this situation of the conditions under which this was made.

Mr. O'NEALL: We could go into that right here. The testimony is that——

The COURT: No, I mean the fact that it was made to the Civil Service Commission by an officer of the government in the Personnel Department, whose duty it was to make such reports.

Mr. O'NEALL: Very well, but the way we tackle that is this, we say first of all the statement was not true and the first requirement of conditional privilege is that the statement be in substance true.

The COURT: Why do you think this is conditional privilege as to those statements?

Mr. O'NEALL: Well, because, Your Honor, he was under no obligation to make charges against this man. He hadn't even seen the letter that he was basing his charges on, he had an option to do it and it was an option rather than a legal obligation to make charges, so it was clearly a conditional privilege on [131] his part; when he undertook to make those statements, he was, colloquially, sticking his neck out.

The COURT: Well, in that case that you mentioned, that didn't involve the government.

Mr. O'NEALL: No, Your Honor, it did not, that was a question of where did you have conditional privilege, on what was it based; it was based on the fact that the law will allow and expect a person who speaks for some good reason and in good faith——

The COURT: In reference to this telephone conversation that Mr. Love says was had, what is your view with respect to that as to whether that is qualifiedly privileged?

Mr. O'NEALL: I would say clearly that was not qualifiedly privileged, because the man who called was not really calling even in a representative capacity.

The COURT: I think all the cases take the position that where one calls at the instance of another and with his consent—Mr. Love testified on the stand, he indicated very clearly, I don't recall exactly what his words were now but: "He asked me should he call the defendant to see what he could do." Then he was asked on cross-examination: "And you said, 'Sure, go ahead'?" Answer: "Yes." So that at least you could say that it was with his assent.

Mr. O'NEALL: I would certainly be glad to say that he had no objection to this man doing that and there was certainly [132] I think counsel for the defendant would concede, there was no obligation on the part of Mr. Newbury to answer and since there was no obligation there of any kind to answer to that statement, his privilege, if he had one, was limited by several facts, several considerations, one, what he said had to be true or reasonably close to the truth and he had to be acting in good faith in making this statement.

Now, then, we think that it is clear here and from the Steamboat Case, we know that our Court here has held and I believe Your Honor mentioned the Restatement that the question or the intervention of a person on behalf of another doesn't create a privilege for the person making the defamatory remarks to repeat them. If I call up on behalf of Mr. Love and say something, since I am his attorney, that might make a difference, but if I am his friend or somebody who is just considering his case and I call up, why, there is no privilege on the part of the other side, of

the person I speak with, to repeat those things to me, they have no obligation to do so, hence they have no privilege. It is, for instance, like any privilege, as an attorney there are some things I cannot say if I am called to the witness stand; it is not to me, really, so much as it is a privilege to someone else. In other words, there has to be an obligation on me for me to have that privilege and that is what was missing in the case of the telephone conversation, there wasn't any obligation on the part of Mr. Newbury to [133] repeat those statements. All Mr. Newbury had to say was, "Call the Civil Service Commission, I am not interested in this case, I don't care about it," but instead, he did care about it and he did speak on it.

Then, we come to this one last point which may not be necessary, but I think it is important, that is that you find malice when you—you offset any presumption of malice by the very words used and if you find malice at one time in the same person, you can presume that at a later repetition or any further comment on the case, that same malice is present.

Now, we come to that point, all that happened here, Your Honor, was that Mr. Love made a statement in a written grievance which he was authorized to do, he was assured by the War Department that would not be held against him, there would be no recriminations. In spite of that and even without knowing it and without bothering to find out, and that is grounds for supporting the finding of malice, Mr. Newbury comes back and makes these charges. That is not all, you also get the charges from this. A conditional privilege, as we know, exists only to the extent that the statements are substantially true; the next is that the comments on it must be reasonable, temperate and unabusive, and those words come right from the same Ashford Case.

Now, what did this man do? His privilege vanishes and disappears unless his statement passes the test of being [134] reasonable and nonabusive. Well, where is the letter of July 18, I think you have that there, Exhibit 2, he says: "That it is unconscionable conduct on the part of this man to have said that General Mumma didn't want Alexander

on the premises." Now, we have read the affidavit of General Mumma who said he didn't want the man on the premises; so, first of all they are wrong; and secondly, even if you did make a mistake, that is hardly unconscionable conduct. That doesn't come under the heading of temperate, reasonable comment.

The next thing is he comes along and he makes a statement that in criticizing his own agency, "An act of this type on the part of a Federal Employee is considered an exhibition of dishonesty to the Government, disloyalty to the employing agency, and a discredit to the service." If you so much as say, "I think you are doing this wrong," then some Army officer who is not even supposed to act in this, and that is the other point I want to mention, comes back and says by criticizing your agency that is dishonesty to the Government, disloyalty to your agency and you are a discredit to the service. That is not reasonable, it is not temperate and it is abusive. So there, his privilege would disappear right into thin air.

Then, we come to this point, it has been stipulated that Mr. Newbury was on active duty in the regular Army and we more or less agreed if there were trick connotations in any of those words, they'd be stricken; what we mean is he was an Army officer on active duty in the United States Army. We cited [135] two provisions of Title Ten of the United States Code; in substance, those provisions provide an Army Officer cannot be given an assignment to do civilian matters, he can be used for Army purposes and in the Army and only there. So, then you come to this question, was this man, as an active Army Officer on active duty, was he entitled in view of that Statute to assume any position with respect to civilian employees? We think the answer, as a matter of law, is that he cannot and if he was not in such a position, obviously he can have no privilege because he, by law, is prohibited from having any such authority.

• • • • •

[136] The COURT: This is what he said, Mr. Love said that Mr. Newbury said that Love had been fired on charges and that the charges were that he, Love, had taken papers out of the files at Jeffersonville, Indiana, Quartermaster Depot and given them to Senator Capehart without authority and that he had been found guilty of that by the Civil Service Commission, and other charges.

Mr. O'NEALL: All right, I see what Your Honor means. Now then, of course, that just makes it worse, that doesn't help the defendant in any way because here he is divesting himself of the slender protection of quoting another person. Of course, we have a specific answer to that in General Mumma's affidavit because General Mumma's affidavit is inconsistent with the claim made by the defendant but if he is going to stand on that statement, in other words, he has got to accept that until he disproves it or until the jury doesn't believe it, and since we have also denied it and he hasn't insisted the statement is true, then I think there is no question but there is a showing of a defamation within the Statutory period. They are on notice we were making this claim, there is certainly no surprise, if there is any variance it is in their favor rather than a variance where it is against us, where we are trying to prove something that would be out of line with what we can prove, it would be [137] absorbed or merged, slander being the lesser of those two. So, under those circumstances, I don't see anything in that variation which would be fatal to our case and I do think, as to that, there is a question for the jury.

As to the other, I don't want Your Honor to think that because I haven't belabored the point that we bow our heads to the decision in Colorado and in New York, because we do not. We do feel that that decision is wrong and we think this, that the Court does have in its power and in its discretion authority to arrive at a just result here, the power to say to Mr. Newbury, now, then, you tell us, you decide, we are going to require you to retract this or stand liable or prove the truth, because in the absence of truth, he has no privilege. And, he has repeated the charge

within the period of time and further, as I said before, you have the intemperate comment which in the case of conditional privilege washes out the privilege completely, and we do feel that there should not be a directed verdict.

• • • • •

[143] The COURT: The Court will grant the motion to eliminate from this case all of the written documents on which the plaintiff relies. The Court believes that the statute of limitations does apply and also that privilege applies to those. As to the alleged oral statement on which the plaintiff relies, the Court will deny the motion.

• • • • •

[147] The COURT: I don't agree with you on the qualified privilege.

Mr. TOOMEY: I understand, Your Honor.

The COURT: I didn't know whether you understood or not.

Mr. TOOMEY: Yes, I understand and I take it your ruling is, also, there is no absolute immunity as to that conversation.

[148] The COURT: Yes.

Mr. TOOMEY: Yes, I understand.

• • • • •

ARTHUR W. NEWBURY, the defendant, called as witness on his own behalf, having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION.

By Mr. TOOMEY:

• • • • •

Q. Did you have such a conversation with Mr. Maginnis? A. I did not.

Q. How are you so sure that you did not? A. Well, I had been instructed, after the case had been [149] closed by the Commission, the Civil Service Commission, there were several suits instituted, the files were then turned over to the Judge Advocate General of the Army, and I was instructed

to pass on all papers, calls, and so forth, through the Judge Advocate General, therefore, if any calls came or any correspondence came, I definitely sent that to the Judge Advocate General.

Mr. O'Neall: May we approach the bench?

(The following occurred at the bench:)

Mr. O'Neall: I don't want to interrupt very often, but isn't that a hearsay statement there? I object to it on that ground, he said he was told thus and so and ordered thus and so.

The Court: The objection is sustained.

Mr. O'Neall: I would like to have that stricken and I would like to not have to raise the objection, when it is obvious like that.

Mr. Toomey: All right, he said it.

(The following occurred in open court:)

The Court: Ladies and gentlemen of the jury, the witness has just testified to something that he said someone else told him. You are instructed to disregard the statement.

By Mr. Toomey:

Q. Is it your testimony, Mr. Newbury, that you did not have this conversation with Mr. Maginnis in June of 1952? [150] A. It is, sir.

Q. How often have you met or talked with, had personal contact with Mr. Love, apart from seeing him here in the Court from day to day here in this trial? A. Once.

Q. Once, and when was that? A. At the hearing of the United States Civil Service Commission in 1948.

Q. You have never met him before? A. I had not.

Q. Had you met him since, up until this trial? A. I believe we saw him once in Court when we were supposed to go to trial before a judge, I think, and he was in Court that day, that is the only other day I have seen him.

Mr. Toomey: I have no further questions.

Mr. TOOMEY: Your Honor, I ask the Court to take judicial notice of the fact that the Court of Appeals decision in the Deak v. Pace and Patton v. Pace cases, reference to which was made by Mr. Love during his direct examination, was decided on [151] the seventh day of December, 1950. For Your Honor's benefit, it is reported in 88 App. D. C.

The COURT: What is the page number?

Mr. TOOMEY: 50

The COURT: Pass that up, please, Mr. Martin.

(The clerk handed the volume to the Court.)

The COURT: Do you want to see this, Mr. O'Neall? It is where the marker is.

Mr. O'NEALL: Thank you, Your Honor.

The COURT: Were these cases taken to the Supreme Court?

Mr. TOOMEY: They were not, Your Honor.

The COURT: The Court will take judicial notice that those cases were decided on the seventh of December, 1950.

Mr. TOOMEY: The defense rests, your Honor.

* * * * * * *

HAROLD ROBERT LOVE

The plaintiff, called as a witness in rebuttal, resumed the stand and testified further as follows:

DIRECT EXAMINATION.

By Mr. O'NEALL:

Q. Mr. Love, you will remember you are still under oath. Would you tell the Court and the jury, please, what it was that prompted you to go and see Mr. Maginnis?[152] A. An article written by a columnist in the Chicago Tribune of Illinois, that I saw by reading that paper, I used to get that paper frequently.

Q. And what case was referred to in that article? A. It referred to the Court of Appeals reversing the lower Court in the Deak and Patton cases and the Secretary of War apologizing, writing a letter, and so on.

Q. What you read was the article in the newspaper and not the Court decision, is that correct? A. That is correct, and I didn't read it until 1952.

Q. I mean at the time when you went to see Mr. Maginnis, what you had read was the newspaper article? A. That is all.

* * * * *

[163] The COURT: I meant in this case we have here. I think, very likely, that this Mr. Maginnis would be considered his attorney.

Mr. TOOMEY: I think certainly if a man goes to consult an attorney, I think that that matter is privileged.

Mr. O'NEALL: I don't think so. May I remind the Court of this, I believe from a practical standpoint now—don't you remember you said you were going to call this Maginnis, you said "We are going to call Maginnis."

Mr. TOOMEY: All right.

Mr. O'NEALL: So, you were just as free to call him as we were.

Mr. TOOMEY: It may be I decided he couldn't have testified to what Mr. Love said to him and what he said to Mr. Love, and this whole conference.

Mr. O'NEALL: That is why we wouldn't call him, either.

Mr. TOOMEY: But Mr. Love is the only one who can waive the [164] privilege.

Mr. O'NEALL: Oh, no, if they had conversations back and forth, that is not in the presence of your man.

Mr. TOOMEY: I think Mr. Love is the only man who can waive that privilege.

Mr. O'NEALL: He just told you he is not his attorney.

The COURT: That is true, but do you know, when you go in a place, there is decision after decision to the effect that where the person had gone in and talked and they hadn't received any fee but they went in there for the purpose of seeing him as an attorney, legal advice and so forth, and to get him to take the case, why, time and again where it has been claimed that there was no relationship of attorney and client, the Courts have held that there was and have kept that party from going out and telling what this per-

son says. Of course, naturally, no privilege would exist after he had declined to take the case, but in this case this man didn't decline until after that.

Mr. O'Neall: Let me put it this way, I don't think this instruction is particularly material at this stage in the case anyhow and I have no objection if we say either side, that this applies to either side.

The Court: I don't see how it could apply to them, they claim no such conversation took place.

Mr. O'Neall: One way to do it is, I am speaking now as [165] much as anything else from a purely practical standpoint, not from strictly——

The Court: You are the only person that claims that he has knowledge of material matters, the other side claims that he hasn't, and this instruction says if you find that the plaintiff in this case has failed to call and examine as a witness any person who has knowledge of material facts at issue in the case—well, I guess it would be a material fact if he didn't have a conversation with him.

Mr. O'Neall: I think there is another rule, you don't have to call a person for purely cumulative purposes.

Mr. Toomey: I think in the circumstances of this case, as Mr. Love testified, that would be a little more than cumulative.

Mr. O'Neall: Let me ask you this question, if you thought Maginnis would say "I never heard of Love, I don't know anything about him," would you have called him?

Mr. Toomey: I don't know what Maginnis would say, except what you told me.

Mr. O'Neall: I do remember I told you before the trial.

Mr. Toomey: Yes, the day before.

Mr. O'Neall: That is right, after I talked with him.

The Court: What did he say?

Mr. O'Neall: Maginnis?

The Court: Yes.

[166] Mr. O'Neall: Maginnis said a number of people had come to him but he did remember Love and he can remember Newbury and he did remember the two together, but more than that he said, "I cannot tell you." He said,

"About a thousand people came to me to get me to take those cases after I won that Deak case." And I said, "Well, he says you called him up." He said, "That is very probably what I did, I did that on several occasions."

Now, how is he going to testify to that? Objections would be ringing from floor to ceiling and from the balcony, if I tried that. If, from a practical standpoint, there weren't any material matters that he could have testified to——

Mr. TOOMEY: Oh, indeed there were. He could have said that "I put this call in."

Mr. O'NEALL: He said he doesn't remember that.

Mr. TOOMEY: "And I asked for Mr. Newbury and a voice at the other end of the line said Mr. Newbury."

Mr. O'NEALL: You are saying he could testify to something he doesn't remember.

Mr. TOOMEY: Whether he remembers it or not, that is the sort of thing—so far as the jury is concerned, he could have tied this case up for Newbury.

Mr. O'NEALL: Robert L. Toomey Esquire, you know perfectly well that rule doesn't apply to any such thing as that; it means if we have got a witness who really knows something, [167] clearly can testify, and so forth and so on and we don't produce that witness, then they can take that into account. I told you the day before the trial what this man told me, that he had had all these people come and I told you I wasn't going to call him and I told you why.

The COURT: This case here, that refers to this, said that the jury was told you have no right to assume that it would have been conclusive of the case, that it would have ended this matter.

Mr. TOOMEY: I think that is right.

The COURT: You have only a right to assume that it would have been unfavorable to the plaintiff and for that reason, he was not called.

Mr. O'NEALL: That is a presumption that we all in this room know is contrary to fact and, therefore, it shouldn't be used. The reason I didn't call him, I explained to you before the trial, I was satisfied that this man could not give any testimony that would be admissible.

The COURT: Why don't you all stipulate, can't you stipulate if this man came here——

Mr. O'NEALL: I give you my personal word of honor, as an individual, lawyer and anything else you want.

Mr. TOOMEY: May we go off the record?

The COURT: Yes.

(Discussion off the record.)

[168] The COURT: Why don't both of you just argue on this thing?

Mr. TOOMEY: In other words, make reference to it but make no instruction?

Mr. O'NEALL: If you want, I would say the reason.

Mr. TOOMEY: His testimony that, "I can't remember such a conversation," is unfavorable to the plaintiff.

Mr. O'NEALL: I don't think it is.

Mr. TOOMEY: I think it is, it tends to break it down.

Mr. O'NEALL: Let's stipulate to this, if he had been called, he would have said thus and so, and you can argue from it any way you want and I will argue from it any way I want.

Mr. TOOMEY: What would he say?

Mr. O'NEALL: I suggest we stipulate that if Mr. Maginnis had been called to testify, he would have stated that he remembered the name of Love and he knew Newbury and he remembered the names of Love and Newbury together, that he did not have any further specific recollection, that if he had been asked whether he had made a telephone call to Mr. Newbury, he would have testified that he did not recall and he would have testified that such a procedure would have been normal at that time, but he had been offered about a thousand cases of Civil Service nature at that time and he didn't remember the details.

Mr. TOOMEY: The only thing that worries me is, his testimony that what he probably would have done would be inadmissible if he were here. Now, I am not going to stipulate——

[169] Mr. O'NEALL: All right, knock it out.

Mr. TOOMEY: —he had no specific recollection of such a telephone call.

Mr. O'Neall: And he had no reason to admit it or deny it.

Mr. TOOMEY: He said that?

Mr. O'NEALL: Yes, to say that he did or say that he didn't.

Mr. TOOMEY: If Mr. Maginnis had been called, he would have testified as follows: He remembered the name of Love and Newbury and he connected them together.

Mr. O'NEALL: No, he remembered——

The COURT: You help him to get it, there is no use in both of you writing it.

Mr. O'NEALL: He remembered the name of Love and the name of Newbury and he remembered the two as associated together. He did not recall making any phone call to Newbury and he had no reason to doubt that he had called; he didn't remember it, he didn't have any reason to doubt he had called.

Do you want to say——.

Mr. TOOMEY: I only want to say what he says.

Mr. O'NEALL: That is what he said. I am leaving out the thing that he said he probably did, actually he did say that and that is what I would like to get.

The COURT: You don't have to take this down; if they can agree on it, all right, and if they can't.

(Discussion off the record.)

[170] The COURT: If Mr. Maginnis had been called as a witness, he would have testified that a Mr. Love did call on him and he remembers the name of Mr. Love and Mr. Newbury——

Mr. O'NEALL: Associated together.

Mr. TOOMEY: I think that is perfectly reasonable.

The COURT: All right, associated together, but that many cases have come into his office and he recalls nothing further concerning the Love case.

Mr. O'NEALL: The Love-Newbury matter.

Mr. TOOMEY: It would be the Love case, actually.

Mr. O'NEALL: All right, the Love case.

The COURT: Are you all agreed to that?

Mr. TOOMEY: I think that is all right. I will take Mr. O'Neall's word for that.

The COURT: Can you withdraw this, then?

Mr. TOOMEY: I suppose probably it would have to be withdrawn.

The COURT: All right, number five withdrawn.

Now, how much time do each of you gentlemen want?

Mr. TOOMEY: Well, the issues are so simplified; what do you think, Mr. O'Neall?

Mr. O'NEALL: It is awfully hard to stop talking once you get started.

Mr. TOOMEY: Witness my performance this morning.

Mr. O'NEALL: We certainly will try for fifteen minutes [171] each.

* * * * *

Mr. TOOMEY: One thing I meant to bring up in your chambers and overlooked was this, that I think that the plaintiff's testimony regarding the date of this conversation on the telephone, since he related it to the coming down of the Deak decision and the publicity attendant thereon and we have shown the Deak decision was in 1950, therefore, the jury is entitled to an instruction if they find there was such a conversation but that it took place not in 1952 as alleged but in 1950 or 1951, then it would be barred by the statute of limitations, I think we are entitled to that, definitely.

Mr. O'NEALL: The reason I object to that is because he also testified, when he answered as to when that conversation was, he looked up his records and testified from his records showing when he had come to Washington from Minnesota.

Mr. TOOMEY: There is a conflict.

The COURT: I don't believe there is any conflict in his testimony, he said that he looked it up at the time that he [172] came here to see Mr. Maginnis and he said it was 1952.

Mr. TOOMEY: But he also stated it was right after the Deak decision and the publicity attendant thereon and we have shown by our case that the Deak decision came down in 1950.

The COURT: You can argue that but I don't believe I am going to tell anything on it.

Mr. TOOMEY: If the conversation was in 1950 then obviously it is barred by the Statute of Limitations.

Mr. O'NEALL: No, because he testified that he got it from —he knew about this man from reading not the Deak decision but reading an article in the newspaper. Then, he says he figured out when it was by his records which showed when he had come to Washington and he had only come about two times and that was how he related the date, and that is in the answer to your interrogatories that you had for a year. I don't think that would be proper at all.

Mr. TOOMEY: I think there is sufficient contradiction that the jury is entitled to consider it.

The COURT: If I mention it, I will tell them he testified it was in 1952.

Mr. TOOMEY: Right.

The COURT: If I mention it to the jury in the instructions, I will tell them that Mr. Love said it was in 1952.

Mr. O'NEALL: When he came here——

Mr. TOOMEY: That is right.

[173] Mr. O'NEALL: —And talked with that man.

The COURT: No, when he said the telephone conversation was.

Mr. O'NEALL: Sure.

Mr. TOOMEY: That is right, he said that but we contend if it was shortly after the Deak decision came down with the attendant publicity thereon that that happened in 1952 and if it did, it is barred.

The COURT: I don't think I will tell them anything about that.

Mr. TOOMEY: I can argue that, in any event?

The COURT: Yes.

(The following occurred in open Court:)

OPENING ARGUMENT TO THE JURY ON BEHALF OF THE PLAINTIFF

Mr. O'NEALL: If it pleases the Court, ladies and gentlemen of the jury, before I talk to you in my summation of this case, I am authorized to read to you a stipulation which Her Honor will inform you is to be taken as entirely undisputed. The stipulation is as follows: If Mr. Maginnis had been called as a witness, he would have testified that a Mr. Love did call on him and that he remembers the name of Mr. Love and Mr. Newbury associated together, but that many cases have come into his office and he recalls nothing further concerning the Love case.

* * * * *

[174] Now, I promised certain things to you in the opening statement that I made to you. I believe that we have fulfilled the promises that we made to you of what we were going to show. The defamatory statements were made and, as Her Honor will explain to you, the only one that is left for consideration by the jury at this time is the one made by telephone, over the telephone by Mr. Newbury to Mr. Maginnis. Now, that is disputed; Mr. Newbury says there was no such conversation, Mr. Love says there was. You have heard the stipulation, Mr. Maginnis, if he had been called would have told you just what I have read to you as the stipulation. It is asking an awful lot to ask Mr. Maginnis to remember more and since you can't have a person remember more than he does remember, we have read to you the stipulation which is the most he could have said. He had many cases, it is unreasonable to suppose that he could remember just what he did to every prospective client or for every prospective client that came into his office, but it is significant that he does remember those two names associated together.

Now, then, on the stand, in an effort to probe as to whether or not there had been such a conversation, my

worthy [175] opponent asked Mr. Love when that took place, with some definiteness, and he told him and I explained why he had gone to see Mr. Maginnis.

He went to see Mr. Maginnis because Maginnis had been associated with a very famous case and he explained that he had read about that in a newspaper published in the Midwest. He was living at the time in Minnesota, Mr. Love, he still does live there; and having read about that, he came to Washington and when he did come to Washington, he went around to see this particular lawyer to ask him if that lawyer would take the case. When he was asked how he knew it was in June of 1952, I think you will all recall he said, "I looked up my record as to when I came to this city and that was when it was." He also testified that he had come to see Maginnis as the result of hearing about Maginnis' victory in the Deak Case.

Now, on rebuttal, as you will recall, I asked Mr. Love whether or not he had read the decision and then went to see Mr. Maginnis or whether he had read a newspaper article and because of the article went to see him, and you all heard the testimony that it was because he had read the article not the decision. I asked him that because my worthy opponent introduced this book here, and we can't dispute the book, showing that the Deak decision was handed down in 1950.

That isn't inconsistent and that certainly does not prove that there was no conversation. This man has sworn to you that [176] it did take place and he told you what happened and how it happened. It was entirely reasonable to suppose that that is what happened, just as a matter of supposition. But we don't have to suppose and you are not supposed to suppose, you have the testimony, the undisputed testimony that this statement was made over the phone.

Now, then, at the proper time you are going to be instructed by Her Honor if you believe that this conversation did take place, it is a simple question, you either do believe it and you find it as a fact, or you don't, if you find that to be the case, then you are to find in damages for the plaintiff.

Now, then, Her Honor will instruct you and I urge this upon you, at the time of considering the damages to the plaintiff, you must remember and you should remember that this is his only chance to recover any compensation for the wrong that has been done to him. So, you must give every damage that can possibly come from the defamatory remarks, that can reasonably be expected to come from them. In other words, this is once and for all.

Now, then, the statements, the nature of these statements being what they were, that is the accusation that the man was guilty of a crime, that relieves the plaintiff from any obligation to come forward and prove exactly what the damages were to him. So, don't speculate on why we haven't shown you specific damages.

If I accuse you, sir, of a crime that you can be put in [177] prison for, and I am stating an untruth, you may sue me and you do not have to show that as a result of that, you lost your job, or this or that or anything else. The mere making of such a statement as that renders me liable, so we do not have to prove exactly what the damages were. We could prove that and you could take those things into consideration, you have heard Mr. Love's testimony as to what his salary was.

Now, then, you are also at liberty to bring in, if you find for the plaintiff, a verdict, a judgment based on punitive damages. Now, the purpose of punitive damages is this—first, to do that, you must have found malice, but you can find find malace from the nature of the statement; if you find the statement was made, it is untrue as a matter of presumption, if you find it was made and then you can find malice from the very statement, itself.

When I accuse a person of a crime, I have got no business to do that unless I am speaking the truth. There is no question of privilege here or anything else, the question is did he make the statement? He made the statement, we say, and if you find he made the statement, you bring in damages for the plaintiff.

Then, the question narrows down to this, are you going to give exemplary damages in addition to compensatory

damages. Now, the compensatory damages may include nominal damages, if you feel that that is appropriate. But in addition you may also [178] bring it, in this case, upon a finding of malice, you may bring in punitive damages; that is this, so that in the future, people circumstanced as this defendant, will be more careful as to what they say and to whom they make such statements. In other words, that kind of a verdict is to punish and prevent this kind of character attack and assassination and smearing.

If you don't bring in that verdict, it doesn't mean you approve or condone the action taken by the defendant in this case in making these defamatory statements, and I am not trying to make you think, if you don't give us punitive damages, you are approving of what he did, because that is not the issue. But you are at liberty to impose such a penalty on this defendant in order that other people who have the chance to smear other names and other characters, will be on their guard and realize that if they do, they do it at their peril and they may be held accountable.

You remember I said in my opening statement that a reasonable people want to give reasonable protection to reasonable officials. We don't want more than that and we don't want less than that. The question is, was the statement made? If it was made, there is no defense. If it was made, there is no defense, you will find for the plaintiff. We say the evidence is clear that it was made.

The verdict depends upon only one question, do you find that the statement was made by the defendant, Mr. Newbury?

[179] CLOSING ARGUMENT ON BEHALF OF THE DEFENDANT

Mr. TOOMEY: May it please the Court, ladies and gentlemen of the jury, I, too, made a promise to you at the beginning of this case, namely, that there would be a very simple case for you to decide and the issues would probably, by the time the case got to you, have been considerably refined and narrowed down. I, too, have kept my promise because there remains for your consideration, as counsel

has said, really only one question, whether or not Mr. Newbury made a statement over the telephone to a Mr. McGinnis which was defamatory of Mr. Love.

For reasons of law, the other instances, in the documents of July 18, July 11, and September 2, 1947, have all been removed from the case and you don't have to worry about them for a minute and Her Honor will so instruct you.

So that now the only question for your consideration, factually, is whether or not there was such a telephone conversation and, of course, secondly, whether or not, if there was such a conversation, defamatory matters about this plaintiff were communicated to the recipient of the telephone call. Mr. Love says that the call was made; Mr. Newbury says no, it wasn't; Mr. Maginnis doesn't know whether it was made or not and that is why he wasn't down here to testify, because he doesn't remember whether it was made. Accordingly, he would have done very, very little good.

Now, since we don't have Mr. McGinnis who made the call, [180] because he doesn't remember whether he made such a call, in order to find that there was such a call made, we have to rely upon Mr. Love's identification of the voice at the other end of the telephone.

You will remember that he testified that he picked up the receiver, the second telephone in Mr. Maginnis' office, after the conversation had commenced, that he didn't hear Mr. Newbury identify himself but he was able to identify the voice at the other end of the line because he recognized the voice, that is Mr. Newbury's voice.

Upon cross-examination, I asked him, if you will recall, how many telephone conversations he had had with Mr. Newbury; one, back in 1947. I asked him how many conversations he had prior to this phone conversation, this alleged phone conversation, in person; one, in 1948.

Now, this telephone call, according to Mr. Love, was made in June of 1952 and he asks you members of the jury to believe that, on the basis of his vast experience in conversation with Mr. Newbury in the past, he was able to recognize Mr. Newbury's voice on the telephone. He didn't make the

telephone call, he didn't dial the number, all he did was to pick up the phone in the middle of a conversation, an alleged conversation and, of course, we deny it, and recognize the voice that he had heard on only two prior occasions, the most recent of those prior occasions being more than four years prior to this [181] alleged incident.

We submit that that is just stretching your credulity too far and that you should rather believe the defendant's version of the story, to wit, that there simply was no such conversation. He doesn't remember such a conversation nor does Mr. Maginnis remember such a conversation, and he is the man who is supposed to have placed the call.

One other point, Mr. Love testified, as I remember it and, of course, your recollection is to supersede mine, but he testified, if I recall correctly, that the reason he came to Washington was because of the great publicity that was attendant upon the decision of our Court of Appeals in this District, upon its decision in the Deak and Patton cases.

Now, as we have already shown to you, the Deak and Patton case came down in December of 1950. Now, if there was great publicity attendant upon the Deak and Patton cases in the Chicago newspapers, I submit that it certainly was not two years and a half after the decision came down. So, for those contradictions and those improbabilities in the plaintiff's story, we feel they are sufficient to warrant the jury in concluding that Mr. Love was mistaken about the conversation at all or certainly as to its date.

Now, then, the damages. There is no testimony that Mr. Maginnis repeated anything that was allegedly said to him over the telephone by Mr. Newbury. So far as we know, and [182] I presume it to be the case, in as much as if the call was made, it was made by an attorney representing a person who had come into his office, certainly Mr. Maginnis, if he heard such matter over the telephone, was not going out and spreading it among his friends and neighbors, so if there was such a call and if Mr. Newbury made these

defamatory comments, we can certainly reasonably assume that they went no further than Mr. Maginnis' ears.

Now, that being the case, what conceivable damage came to Mr. Love as a result of the conversation? None whatsoever. Perhaps it hurt his feelings, but that isn't the test of damages. The test is what damages did it do to Mr. Lowe's reputation? I submit that it did no damage, if there was a conversation, because the matter obviously stopped with Mr. Maginnis. No damage can flow from that and, therefore, I urge upon the jury that if you find that there was such a telephone call and that Mr. Newbury stated these things that he is alleged to have stated, that in considering the question of damages, you bear that in mind and if you find that you must award damages therefore, to return damages in a nominal sum and a nominal sum, I think, usually in most of the law cases, is six cents.

* * * * *

[189] COURT'S CHARGE TO THE JURY

THE COURT: * * *

Now, as you know, the Judge decides questions of law and the jury determines the facts. As the result of a decision made by the Judge in this case on points of law, this case has been disposed of in so far as all of the written statements alleged to be defamatory are concerned. So, as to such statements, you are not concerned, as only one alleged statement, an alleged oral statement, remains for your consideration. We have what is called a statute of limitations and this statute of limitations allows a person to bring a suit within a specified period of time. The Court has grounded its action on the statute of limitations and also on the law relative to privilege.

The defendant, Mr. Newbury, was acting within the scope of his official duties as Chief of Civilian Personnel, Finance Department, Department of War, and he is immune from suit for [190] the papers he signed and sent to the Civil Service Commission concerning Mr. Love in the course of his duties; and that is what the Court has meant by saying that the Court has disposed of the written documents or papers which are the subject of this suit.

Now, the one alleged oral statement remaining in the case will now be described or, at least, this is my recollection, but it is your decollection that you are to be guided by; if your recollection differs in any way from the recollection of the Judge or of the attorneys in the case, then it is your recollection that you are to be governed by.

The plaintiff, Mr. Love, testified, as I recall it, that he went to see an attorney, Mr. Maginnis, to get the attorney to take his case and that, while he was visiting this attorney, the attorney asked the plaintiff, Mr. Love, if he, that is the attorney, should call the defendant, Mr. Newbury, and Mr. Love testified that he gave his assent or, at least, that he didn't object or words to that effect and that a telephone call was made.

Mr. Love testified that he listened in on the telephone conversation or part of it between the attorney and the defendant, Mr. Newbury. Mr. Love claims he recognized Mr. Newbury's voice. Mr. Love further testified that Mr. Newbury, the defendant, said that he, that is Love, had been fired on charges; that the charges were that he, Love, had taken [191] papers out of the files at the Quartermaster Depot, Department of the Army, at Jeffersonville, Indiana, and given them to Senator Capehart without authority; and that he, Love, had been found guilty of that by the Civil Service Commission, and other charges. That, as I said, is my recollection of the testimony of Mr. Love concerning this alleged statement.

Now, as you know, the defendant, Mr. Newbury, denies that he made any such statement over the telephone.

* * * * *

But you are the judges of the facts; you are the fact-finding body of the Court. It is for you to determine what the facts are in this case. You are to determine what the facts are from the evidence in the case. The evidence in the case consists of the testimony which you have heard from the lips of the witnesses here and from the documents which have been shown to you or read to you, and also the stipulations of counsel. You may also regard as evidence the matters of which the Court took judicial notice.

[192] After you determine for yourselves what the facts are in the case, you then apply to those facts the law as given to you by the Judge and then you reach a proper verdict.

Now, what the lawyers say to you is not evidence and whatever the Judge says to you is not evidence; the evidence is just what I have related to you.

You are not only the judges of the facts in this case, but you are the judges of the credibility of the witnesses. That means that it is for you to determine the credit and weight which you will give to the testimony of each witness who appeared here before you. In determining the credit which you will give to the testimony of any witness, you may take into consideration the demeanor of the witness on the witness stand, whether the witness impressed you as a truth-telling individual or the contrary, whether the witness impressed you as having an accurate memory and recollection.

You may take into consideration the interest of a witness in the outcome of the case. Naturally, the plaintiff, Mr. Love, is interested in the outcome of the case, and the defendant, Mr. Newbury, also is interested in the outcome of the case and, in considering their testimony, you may take that factor into consideration.

You may also take into consideration the probability or improbability of the testimony of a witness, its reasonableness [193] or unreasonableness; and you take into consideration all those factors, human factors, shown by the evidence which may, to your mind, affect the desire or capability of a witness to give perfectly true testimony.

If you believe that any witness has wilfully testified falsely as to any material matter about which the witness could not reasonably have been mistaken, then you may, and it is a matter within your discretion, disregard the whole of the testimony of that witness or such part as you believe to be untrustworthy. In other words, you may base your verdict upon that testimony which you do believe to be true.

You are to decide this case without sympathy and without

passion and without prejudice, for or against any party to this action.

We have in our law what is known as the burden of proof. When a person comes into court and makes a complaint, the burden of proof is on the complaining party. The burden of proof in this case requires Mr. Love to prove his claim by a fair preponderance of the evidence. A fair preponderance of the evidence means the greater weight of the evidence or evidence which, to your mind, has greater convincing force than that on the other side.

In order for you to find a verdict for Mr. Love, the plaintiff in this case, you must be reasonably satisfied that the allegations of his claim are true and that they have been established by the greater weight of the evidence. You do not [194] decide the greater weight of the evidence or the preponderance of the evidence by the number of witnesses on one side or the other. It does not matter which side calls the witnesses; what you are to determine is on which side is the greater convincing force.

You should consider all the evidence which you believe, you should weigh it, sift it and, as I said, weigh it just as though you had a pair of scales. If, in weighing the evidence, you find that it weighs no more on one side than the other but is evenly balanced, then you are told that the plaintiff would have failed to carry his burden of proof. Likewise, if you find that the evidence weighs more on the side of the defendant, Mr. Newbury, the plaintiff would have failed to carry his burden of proof. But if, in weighing the evidence, you find that it weighs more on the side of the plaintiff, Mr. Love, then he would have successfully carried his burden of proof.

Before passing from this subject of the burden of proof, you are told that to successfully carry his burden of proof, the plaintiff must prove by a fair preponderance of the evidence that each and all of the essential allegations of his claim are true: First, that the defendant, Mr. Newbury, made the defamatory statement alleged over the telephone; and Second, that damages resulted therefrom.

Now, we come to the specific issue in this case. I have

[195] already told you what, according to my recollection, is the specific statement relied upon here, the statement allegedly made over the telephone; and I have also told you that the defendant, Mr. Newbury, denies that that statement was made. Now, it is for you to determine whether the statement was of was not made. I do not know what your decision will be, but you are to determine what the truth is and it is my duty to instruct you with regard to all the law applicable to the case.

Now, you are told this, the law presumes, until the contrary appears, that every person has a good character and has done nothing to forfeit the good opinion of the community. The law regards a good reputation as valuable to its possessor and the publication of a defamatory statement, by which a good name is impaired, is an injury for which damages may be recovered.

Now, by publication is meant the communication to a third person of a defamatory statement. This communication may be by word of mouth. Under our law, everyone has a right to say what he chooses but if, without justification, he makes a defamatory statement concerning another person, he is responsible for the damages, if any, that he may have caused that person.

A defamatory statement is a statement that tends to harm the reputation of another person so as to lower him in the estimation of the community or to deter other persons from [196] associating or dealing with him. A defamatory statement may also be defined as a statement which tends to bring another person into contempt, ridicule or disgrace. For example, a statement imputing that another person has committed a crime is defamatory of that other person.

Now, in the case before you, as you know, it is claimed that over the telephone the defendant, Mr. Newbury, said to an attorney, whom Mr. Love was calling upon, that Mr. Love had removed certain papers from government files. Mr. Newbury says he did not make the statement over the telephone. As I said, it is for you to say whether he did or did not.

If you should find he did, then you are told that such

statement accused Mr. Love of committing a crime and it was, therefore, if made, a defamatory statement and the Court so rules. In this connnection, you are told that there is a federal law forbidding removal of a record in a public office and violation of this law has been made a criminal offense. So, as I said, the allegedly defamatory statement here, if made, does charge a criminal offense and is actionable.

In law, there may be grounds for justifying the making of a defamatory statement, such as the truth of the statement made. But the defendant here is not seeking to justify the making of the statement but, on the contrary, he says the statement was not made by him. The burden is not on the [197] defendant to show that he did not make the statement; on the contrary, the burden of proof, which is on the plaintiff, Mr. Love, requires him to prove by the greater weight of the evidence that the statement was made over the telephone as claimed by him.

If you find from the evidence that the defendant did not make the defamatory statement over the telephone, or if you find the evidence equally balanced on the question of whether the defendant made or did not make the statement, then your finding would be for the defendant, as the plaintiff would have failed to carry his burden of proof.

If, however, you find by the weight of the evidence that the defendant, Mr. Newbury, made the defamatory statement over the telephone, then the plaintiff would be entitled to your verdict.

I shall now discuss how you are to determine the amount of damages, if you reach that issue; in other words, if your verdict is for the plaintiff, you then come to the question of damages. In an action for defamation, the question of what damages should be awarded is peculiarly a matter for the decision of the jury. In general, damages recoverable in an action for defamation are for the plaintiff's loss of reputation in the minds of those who knew him or knew about him in his occupation or calling, or as friends or acquaintances, together with the mental suffering as a result of the circula[198]tion of the defamatory statement.

In this connection, the jury may consider the character of the defamatory statement, if made, the area and circulation of the statement, as well as possible future harm which it is reasonably assumed may come to the plaintiff as a result of this statement.

In assessing damages, of course, the jury, in case it finds for the plaintiff, does so once and for all. The jury is instructed that if it finds for the plaintiff, the plaintiff has then established his right to compensatory damages without further proof of damages; because in actions such as this for defamation of one's good name and reputation, it may be utterly impossible and impracticable, for one whose name has been injured, to bring evidence before the jury to show in detail how he has been injured, for a man cannot tell how far the imputation will reach nor where it will ramify, and the law does not require him to offer such proof. That is a question which the law submits to the good judgment of the jury, without proof on the point.

Now, of course, you understand that if you find that the defendant had a telephone conversation with Mr. Maginnis in June of 1952, and that Mr. Newbury made defamatory statements about Mr. Love to Mr. Maginnis, your verdict would be for the plaintiff, but it would only be for whatever damages grew out of the utterance of the defamatory statements over the telephone.

If you find for the plaintiff but you further find that the plaintiff's reputation was such, at the time of the [199] alleged telephone conversation, that he sustained no damages by reason of the alleged defamatory statements, then the plaintiff in that event is entitled to recover not more than nominal damages. By nominal damages is meant some trifling sum.

In order to justify an award of substantial compensatory damages, that is damages in the nature of compensation to the plaintiff for injury suffered as a result of the defamatory statements, you must first find from the evidence that the plaintiff suffered substantial damages as a result of the defamatory statements.

Now, there is another type of damages besides compen-

satory damages. If you should find that the defendant, Mr. Newbury, acted with what the law calls express malice, then you have a right, in your discretion, if you choose to do so, and that is entirely within your discretion, to award, in addition to compensatory damages, a further sum that the law calls punitive damages; that is damages by way of punishment and to prevent others from similar conduct.

Now, then, what constitutes actual malice? Because it is only if you find actual malice that you may award punitive damages. Actual malice means a desire and intention to harm the person concerning whom the defamatory statement was made, or personal spite or ill-will or hostility towards him, coupled with an intent to injure him. Actual malice may be [200] inferred from any wanton, wilful or reckless disregard of the rights of the person concerning whom the defamatory statement is made.

When you return to the courtroom after you have reached your verdict, the clerk will ask you whether you find for the plaintiff or for the defendant. In the event you find for the plaintiff, the clerk will ask you in what amount you find in the way of compensatory damages. Should you find punitive damages, that is damages by way of punishment, then in that event you should state the amount of the punitive damages separately from the compensatory damages.

When you go to the jury room, the first question for you to take up is whether the defendant made the alleged defamatory statement over the telephone to the attorney Mr. Love was visiting. If you find that Mr. Newbury did not make the statement, you would not need to go any further and you would return a verdict for the defendant, Mr. Newbury. On the other hand, should you find for the plaintiff, you would then proceed to the question of damages. And I might say that you would find for the plaintiff, in case you find by the weight of the evidence that the defendant, Mr. Newbury, did make the alleged defamatory statement over the telephone as testified to by the plaintiff.

The burden of proof which is on the plaintiff requires him not only to prove by the weight of the evidence that

the [201] defamatory statement was made, but also requires him to offer evidence as to his injuries and damages, except that as I have said, if a person makes a statement of another person which is equivalent to stating that the other person has committed a criminal offense, then the statement is actionable without proof of more, the plaintiff would be entitled to a verdict.

When you go to the jury room, you will there elect your foreman and your foreman will give each of you an opportunity to express your views and, upon your return to the courtroom, your foreman will state your verdict. However, each of you, individually, may be asked to state the verdict, in which case each of you should be prepared to state the verdict.

When you go to the jury room, I will ask the alternate juror to remain seated for a few minutes, and I am grateful to him for his attention and service in this case.

Are there any objections or requests?

Mr. O'NEALL: No, Your Honor.

Mr. TOOMEY: We are satisfied, Your Honor.

• • • • •

[203] The COURT: Ladies and gentlemen of the jury, the Court is in receipt of a note which states:

"Judge Matthews: The jury cannot agree.

J. F. Healey, Foreman."

Members of the jury, while undoubtedly the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to secure unanimity by comparison of views and by argument among the jurors themselves.

Each juror should listen with deference to the argument of the other jurors and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view [204] of the case from what he, himself, takes.

Each juror should not go to the jury room with a blind

determination that the verdict should represent his opinion of the case at the moment or that he should close his ears to the argument of the other jurors who are equally honest and intelligent as himself.

Accordingly, although the verdict must be the verdict of each individual juror and not a mere acquiescence in the conclusion of your fellow jurors, the Court instructs you that you should examine the issues submitted with candor and with a proper regard and deference to the opinion of each other. It is your duty to decide the case, if you can conscientiously do so.

You should listen to each other's argument with a disposition to be convinced. If much the larger number of jurors are for a verdict for the plaintiff, a dissenting juror should consider whether his doubt is a reasonable one when it made no such impression upon the minds of so many other jurors equally honest and equally intelligent as himself.

If, on the other hand, the majority of the jurors are for a verdict for the defendant, the minority ought to ask themselves whether they might not reasonably doubt the correctness of their judgment which was not concurred in by the majority.

Now, the Court desires to have the jury return to the jury room and to consider the case further in the light of these [205] additional instructions which have been given to you. It has taken two days to try this case and the plaintiff has come all the way from his home in Minnesota to be here. You should decide this case, if you can conscientiously do so.

You may now retire.

(The jury retired to consider its verdict.)

The COURT: I neglected to ask you all if you had anything to say.

Mr. TOOMEY: I don't think so.

Mr. O'NEALL: No, Your Honor. That is very good, Your Honor.

(The jury returned its verdict at 2:45 p.m.:)

Deputy CLERK: Mr. Foreman, has the jury agreed upon a verdict?

Foreman HEALEY: The jury has agreed on a verdict.

Deputy CLERK: Do you find for the plaintiff or for the defendant?

Foreman HEALEY: We find for the plaintiff.

Deputy CLERK: In what amount of compensatory damages?

Foreman HEALEY: One hundred dollars.

Deputy CLERK: One hundred dollars. Do you find punitive damages for the plaintiff?

Foreman HEALEY: None.

Deputy CLERK: Members of the jury, your foreman says [206] that you find for the plaintiff in the sum of one hundred dollars compensatory damages, that you find no punitive damages for the plaintiff, and that is your verdict so say you each and all.

(The jury signified affirmatively.)

(Whereupon, the foregoing proceedings were concluded.)

☆ U. S. GOVERNMENT PRINTING OFFICE: 1956. 186546 1508

LIBRARY
SUPREME COURT U.S.

FILED
AUG 23 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 397

HAROLD ROBERT LOVE,
Petitioner

v.

ARTHUR W. NEWBURY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHARLES F. O'NEALL
Counsel for Petitioner
1625 K Street, N.W.
Washington 6, D. C.

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

INDEX

	page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional Provision and Court Rule Involved	3
Statement	4
Reason for Granting the Writ	
The Decision of the Court of Appeals Disregards Established Limits On Its Power As Defined by Decision of this Court and Deprives Petitioner of His Seventh Amendment Jury Trial Right	9
Conclusion	18
Appendix A:	
Opinion, United States Court of Appeals District of Columbia Circuit (28 February 1957)	20
Judgment (28 February 1957)	22
Order Denying re-hearing (17 April 1957)	23
Appendix B:	
Order of 16 July 1957 of the United States Supreme Court Extending Time for Filing Petition for Writ	24
Order of 20 August 1957 Further Extending Time for Petition	24

TABLE OF CASES

Baltimore & C. Line v. Redman (1935) 295 US 654	10
Blake v. Trainer (1945) 79 US App DC 360, 363	5
Dimick v. Schiedt (1935) 293 US 654, 657	14
Ersler v. Schneider Corp. (1951) 88 US App DC 371, 188 F2d 1022	14
Flint v. Youngstown Sheet & Tube Co. (2nd Cir-1944) 143 F2d 923, 924	14

page

Hansen v. Boyd (1896)
161 US 397 5
Hartford Life & Annuity Ins. Co. v. Unsell (1892)
144 US 439 15
Johnson v. N.Y.N.H. & H. Ry. Co. (1952)
344 US 48 14
McCabe & S. Constr. Co. v. Wilson (1908)
209 US 275 5
Montgomery Ward & Co. v. Duncan (1940)
311 US 242 14
Pomeroy v. State Bank (1863)
1 Wall 592 5
Robertson v. Perkins (1889)
128 US 233 5
Rochin v. California (1952)
342 US 165, 169, 170 14
Slocum v. New York Life Ins. Co. (1913)
228 US 364 10
Strika v. Netherlands Ministry of Traffic (2nd Cir-
1950) 185 F2d 555, 556 15
Tennant v. Peoria & P.U.Ry. Co. (1944)
321 US 29, 35 18
Wilson v. Haley Live Stock Co. (1894)
153 US 39 5

IN THE

Supreme Court of the United States

October Term, 1957

No.

HAROLD ROBERT LOVE,
Petitioner
v.

ARTHUR W. NEWBURY,
Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Harold Robert Love, petitioner herein, prays that a writ of certiorari issue to review the judgment which the United States Court of Appeals for the District of Columbia entered in the above entitled case on 28 February 1957.

OPINIONS BELOW

This case was tried to a jury in the United States District Court in the District of Columbia. The jury returned a verdict in favor of the petitioner (who was the plaintiff in the trial court) and judgment thereon was duly entered. Since there were no motions or requests of the defendant to be disposed of, there was no occasion for, and no opinion was filed in the District Court

below. The present respondent appealed from that judgment.

The opinion of the Court of Appeals (App. A, pp. 20-21), which reversed the trial court and ordered dismissal of the complaint is reported at —— US App DC ——, 242 F2d 372.

JURISDICTION

The judgment of the Court of Appeals was entered on 28 February 1957 (App. A, pp. 22-23). The Court of Appeals granted leave to Mr. Love to petition for a rehearing after the normal fifteen day period had expired. Rehearing was requested and, on 17 April 1957, was denied (App. A, p. 23). By order of Mr. Justice Black dated 16 July 1957 (App. B, p. 24), the time for filing petition for writ of certiorari was extended to and including 20 August 1957; and, later extended until 23 August 1957, (App. B, pp. 24-25). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

The question presented is whether, in the face of express reliance by a plaintiff-appellee on (a) the Seventh Amendment and (b) Rule 50 of the Federal Rules of Civil Procedure, a United States Court of Appeals has the power to reverse a judgment which rests upon a jury verdict in a common law action (slander) and order final dismissal of the claim because it appears to that court that the evidence justified entry of a directed verdict in favor of defendant, when: (1) no motion for a directed verdict was made at the conclusion of all the evidence; (2) the defendant-appellant was "satisfied" with the instructions given to the jury by the trial judge; (3) no motion for judgment notwithstanding the verdict was made; and, (4) no motion for a new trial was requested.

CONSTITUTIONAL PROVISION AND COURT RULE INVOLVED

The Seventh Amendment to the Constitution of the United States provides:—

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Rule 50 of the Federal Rules of Civil Procedure, 28 USCA following 2072, is entitled "Motion for Directed Verdict" and subsection (b) thereof reads as follows:—

> "*Reservation of Decision on Motion.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with his motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

STATEMENT

The petitioner, Harold Robert Love, brought this suit in the United States District Court for the District of Columbia against the respondent, Arthur W. Newbury, to recover damages for defamation of character by reason of declarations made by Mr. Newbury over a period of time.

Jurisdiction of the trial court was based on the fact that (1) the claim was *in personam* and transitory in nature; (2) the amount in controversy was more than $3,000 exclusive of interest and costs; and, (3) personal service was obtained on the defendant.

The complaint was drawn by the petitioner *pro se*. Each and every one of the many matters referred to in the several paragraphs and sub-paragraphs of the complaint were removed from the case by the trial judge at the conclusion of plaintiff's case. However, in the opening statement made by Mr. Love's attorney in addressing the jury, it was stated that the plaintiff would prove that Mr. Newbury had slandered the plaintiff in a telephone conversation with a Mr. Maginnis less than one year prior to the filing of suit. Counsel for Mr. Newbury informed the jury in his opening statement that Mr. Newbury would prove that no such conversation took place and, at least, not within the one year period of limitation.

The only issue which the trial judge refused to dispose of upon Mr. Newbury's mid-trial motion was the claim for slander in the telephone conversation which, according to Mr. Love's testimony, had taken place between the defendant and Mr. Maginnis. After his motion for a directed verdict was denied, Mr. Newbury presented his own evidence. Making it clear that he did not rely upon either privilege or truth as a defense, Mr. Newbury testified to the jury that he had never had any conversation with Mr. Maginnis regarding Mr. Love.

The defendant did not ask for a directed verdict when all of the evidence was in, and the trial judge did not deny any instructions requested by the defendant, nor did the trial judge give any instructions which were objected to by the defendant. Under instructions which "satisfied" the defendant, the case was submitted to the jury on the single issue as to whether or not Mr. Newbury had defamed Mr. Love in a telephone conversation within one year prior to the bringing of suit. The jury found in favor of Mr. Love in the amount of $100 and judgment on that verdict was duly entered in his favor. The defendant did not move for judgment notwithstanding the verdict, nor did he move for a new trial.

In his "Brief for Appellant" in the Court of Appeals, the present respondent (Mr. Newbury) assigned error to the trial court as follows:—

> "The district court erred in failing to direct a verdict for appellant on the ground that appellant's statements were either absolutely or qualifiedly privileged."

The record in this case, however, establishes beyond peradventure of doubt that:—

(1) The only motion made by Mr. Newbury for a directed verdict was the motion made upon the conclusion of plaintiff's case-in-chief. Since Mr. Newbury thereafter presented evidence on his own behalf, his right to object to the denial of his mid-trial motion was waived. **Robertson v. Perkins** (1889) 128 US 233; **Wilson v. Haley Live Stock Co.** (1894) 153 US 39; **Hansen v. Boyd** (1896) 161 US 397; and, the rule is not otherwise howsoever the mid-trial attack be made, **Pomeroy v. State Bank** (1863) 1 Wall 592; **McCabe & S. Constr. Co. v. Wilson** (1908) 209 US 275. This undisputed rule is also stated in the most frequently cited case of the Court of Appeals below, **Blake v. Trainer** (1945) 79 US App DC 360, 363 (footnote 2), 148 F2d 10;

(2) Mr. Newbury did not defend on the grounds of privilege. According to the sworn testimony of Mr. Newbury himself, the statements charged to him could not have been absolutely privileged since long before the alleged conversation with Mr. Maginnis, Mr. Newbury had been instructed to pass on to the Judge Advocate General any and all inquiries respecting Mr. Love;

(3) Counsel for Mr. Newbury elected to defend upon the factual defense of "no statement" rather than to rely upon the defense of privilege or the truth. This election was consistently maintained by Mr. Newbury's counsel from the initial moments of the case down to and including the final argument to the jury. Thus, in his opening statement to the jury, Mr. Newbury's attorney, referring to the alleged Newbury-Maginnis telephone conversation, promised that the defense would "show to you that simply is not the fact; I will say no more than that, it is not so and we will show you that it is not so." Later, in his mid-trial motion for a directed verdict, the following colloquy took place between the trial judge and counsel for Mr. Newbury:

> "THE COURT: Do I understand that the defendant concedes there was a telephone conversation?
>
> "MR. TOOMEY: No, we do not . . . We do not concede it for a moment . . ." (JA-55).

In his argument to the jury, counsel for Mr. Newbury said:—

> "MR. TOOMEY: . . . [T]here remains for your consideration. . . *only one question*, whether or not Mr. Newbury made a statement over the telephone to a Mr. Maginnis which was defamatory of Mr. Love.
>
> • • • •
>
> So that now *the only question* for your consideration, factually, is whether or not there was such a telephone conversation . . . Mr. Love says that

the call was made; Mr. Newbury says no, it wasn't . . .

• • • •

. . . [Y]ou should rather believe the defendant's version of the story, to wit, that *there simply was no such conversation.*" (JA-79, 81. Emphasis added).

Further, the trial judge instructed the jury, in accordance with the theory on which defendant had tried the case, and quite clearly, as follows:—

" . . . [T]he plaintiff must prove by a fair preponderance of the evidence that each and all of the essential allegations of his claim are true: First, that the defendant, Mr. Newbury, made the defamatory statement alleged over the telephone; and Second, that damages resulted therefrom.

"Now, we come to the specific issue in this case. I have already told you what, according to my recollection, is the specific statement relied upon here, the statement allegedly made over the telephone; and I have also told you that the defendant, Mr. Newbury, denies that that statement was made. Now, it is for you to determine whether the statement was or was not made. I do not know what your decision will be, but you are to determine what the truth is . . . [JA-85, 86].

• • • •

"In law, there may be grounds for justifying the making of a defamatory statement, such as the truth of the statement made. But the defendant here is not seeking to justify the making of the statement but, on the contrary, he says the statement was not made by him. The burden is not on the defendant to show that he did not make the statement . . .

"If you find from the evidence that the defendant did not make the defamatory statement over the telephone, or if you find the evidence equally balanced on the question of whether the defendant made or did not make the statement, then your finding would be for the defendant, as the plaintiff would have failed to carry his burden of proof.

> "If, however, you find by the weight of the evidence that the defendant, Mr. Newbury, made the defamatory statement over the telephone, then the plaintiff would be entitled to your verdict." (JA-87).

After the foregoing instructions were given to the jury, Mr. Newbury's attorney stated to the trial judge "We are satisfied, Your Honor." (JA-90).

Although the record clearly establishes the fact that Mr. Newbury declined to defend upon the ground of privilege and instead chose to defend one step ahead of that defense, i.e., by denying the alleged defamatory remarks—the Court of Appeals in its *per curiam* ruling declared that:—

> "[Mr. Newbury] contended below that the statements complained of were not actionable, even if defamatory, because (1) he made them in connection with his official duties; and (2) he made them in reply to an inquiry from appellee's attorney and his reply was not malicious and did not go beyond the inquiry."

As to item "(1)" above, the transcript of the proceedings in the trial court makes it clear beyond argument that the Court of Appeals erred in saying that Mr. Newbury contended that he had made the statements complained of "in connection with his official duties." Thus, at pages 66, 67 of the Joint Appendix it appears that Mr. Newbury swore under oath that prior to the date of the alleged conversation with Mr. Maginnis, his own superiors had given him instructions to pass on all calls concerning Mr. Love to higher authority.

As to the foregoing item "(2)" of the Court of Appeals recapitulation, the actual record establishes beyond cavil that Mr. Newbury did *not* contend that "his reply was not malicious and did not go beyond the inquiry." Thus, at page 161 of the Record, the following conversation between counsel is reported:—

"MR. O'NEALL: I object to 4 [Defendant's Requested Instruction No. 4].

"MR. TOOMEY: Yes, as it is worded. I agree with your objection, probably. We would have to strike the language that says 'and that Mr. Newbury, while actuated by malice' because this thing [Defendant's Requested Instruction No. 4] was predicated, when I drafted it, upon the theory of a qualified privilege."

REASON FOR GRANTING THE WRIT

The Decision of The Court of Appeals Disregards Established Limits On Its Power As Defined By Decisions of This Court and Deprives Petitioner of His Seventh Amendment Jury Trial Right

This is not a case in which a disappointed litigant begs a second chance of fortune in the hope that a re-evaluation at new hands will produce a different result; for, to the present moment, there has been no lawful appellate review in this case—at least, not as that term is defined in Federal jurisprudence. The Court of Appeals below did not even purport to respect the limits of its permitted powers as an appellate tribunal. Even though its appellant had not asked the trial court for a directed verdict, had not objected to any jury instructions, had not asked for judgment notwithstanding the verdict, and had not even asked for a new trial, the Court of Appeals below made a de novo determination as to the sufficiency of the evidence on which the trial court's judgment in petitioner's favor was based. The Court of Appeals was not free to re-examine those facts in any other manner "than according to the rules of the common law" because the judgment in the instant case rested upon a jury verdict in a common law action and was entitled to the full protection of the Seventh Amendment; and, at common law the absence of such trial court motions as above enumerated precluded appellate review of the evidence.

For peculiar reason, and with peculiar force, the issuance of the writ is recommended by the facts in this case. The reason is, simply, that the right on which petitioner's case depends is the prohibition against free-wheeling appellate review which is specified in the Seventh Amendment; and, since this Court is the only tribunal which can enforce that right and instruct the Court of Appeals as to the constitutional limits of its power to re-examine evidence on appeal, the proof that such a right has been violated must necessarily justify with peculiar force, the issuance of the writ if the Seventh Amendment is to be preserved—for there is no other recourse. In this case, proof that the Amendment was violated is more than ample.

Petitioner cannot pretend that the question presented by this petition is a new one. This Court has long made it clear that the Seventh Amendment must be respected; that the right to a jury trial must not be curtailed; and, that the United States Courts of Appeals are not at liberty to re-examine facts in cases within reach of the Seventh Amendment except in accordance with the rules of the common law. The decision of the Court of Appeals below in this case flys into the teeth of this whole fabric of law. Petitioner respectfully urges the importance of this Court's rulings, and urges that unless this Court's declarations on those rights are made effective, the Seventh Amendment will disappear.

Possibly the fullest content ever given to the Seventh Amendment by this Court is found in the majority opinion in **Slocum v. New York Life Ins. Co.** (1913) 228 US 364. Certainly, that vigorously contested decision teaches much as to the possible reach of the Seventh Amendment. It may be that **Slocum** has been limited by this Court's decision in **Baltimore & C. Line v. Redman** (1935) 295 US 654; but, although it may be conceded that **Slocum** was limited by **Redman**, the efficacy of the

Seventh Amendment under **Redman** and later decisions is still a stringent limitation on the powers of the United States Courts of Appeals. Certainly, neither the dissenters in **Slocum**, nor the undivided court in **Redman**, would have sanctioned such appellate review as was practised by the Court of Appeals below in this case. Thus, in the present case the court below re-examined the sufficiency of the evidence in a common law action which had been tried to a jury, even though the appellant, at whose behest the re-examination was conducted, had not asked the trial court (1) for a directed verdict, nor for either (2) a judgment notwithstanding the verdict, or (3) a new trial, or both. The appellate court nevertheless proceeded to re-examine the evidence and concluded that the trial judge should have dismissed the claim on the ground that the statements charged to Mr. Newbury were absolutely privileged.

Since Mr. Newbury did not ask for a directed verdict when all of the evidence was in; since he did not object to any jury instructions given or refused; since he did not move for judgment notwithstanding the verdict; and, since he did not move for a new trial—the Court of Appeals below was absolutely forbidden, by the terms of the Seventh Amendment, as well as numerous decisions of this Court, from making any re-examination of the evidence to test the sufficiency of the factual basis on which petitioner's judgment rested. Needless to say, the court below could have reviewed any ruling of the trial court which prejudiced the outcome of the trial; for example, if evidence had been improperly admitted, or if there had been comparable error relating to the procedure at the trial, such injustices could have been corrected irrespective of whether the losing party made any or all of the three motions above listed which are, after all prerequisites to judicial review only when any question as to the sufficiency of the evidence is raised.

But, in the court below, the naked question was whether or not there was sufficient evidence to support the judgment. Since the Court of Apeals below had no power to examine that question, the appeal had either to be dismissed or the judgment affirmed.

The Court of Appeals below did not even acknowledge the existence of the Seventh Amendment or any of the limitations upon its power of review which have been stated so clearly by this Court. True, the failure of a court to make formal obeisance to well known rules of law is not proof positive of error. But, when an appellee defends squarely upon constitutional right and prior decisions of this Court; and, when, as here, that right is clear, the failure of the intermediate appellate court to acknowledge the existence or nature of the claimed right is most significant. To have acknowledged the right which Mr. Love invoked would have made it impossible for the Court of Appeals below to have reversed.

Even if the constitutional issue were not present, the decision of the court below would still be so woefully in error and so contrary to the settled course of judicial proceedings as to justify the issuance of the writ. Thus, the reversal ordered by the Court of Appeals rests upon conclusions that could be valid only if factual support in the record could be found. The factual support is not present in the record for the simple reason that the issues pertinent thereto were not tried in the court below. The absence of fact on those issues arises from the simple fact that the defendant chose not to predicate his defense upon privilege.

It was entirely improper for the Court of Appeals below to predicate its reversal upon grounds which were not relied upon in the trial court. Even without recourse to the limitations imposed by the Seventh Amendment, the decision of the court below is clearly erroneous. A reversal such as the one entered by the court below rep-

resents such a departure from the settled course of judicial proceedings as to require correction by this Court as an incident to its general supervisory jurisdiction, for the decision of the Court of Appeals below is categorically impeached by the record in this case.

As was pointed out to the Court of Appeals below, if Mr. Newbury had chosen to rely upon the defense of privilege—either absolute or qualified—either or both of those defenses would have permitted certain factual issues to have been submitted to the jury. Thus, the question as to whether the alleged statements had been made on a privileged occasion or under conditions giving an absolute privilege depended upon questions of fact as to which appropriate facts issues could have been framed if there had been a defense of privilege. As has already been pointed out, however, Mr. Newbury could not have relied on the defense of absolute privilege for he had been instructed to pass on to other officials all inquiries respecting Mr. Love and not to answer them himself. The question as to whether there was malice in the statements made by Mr. Newbury would have involved fact questions which would have been material if, and only if, Mr. Newbury had chosen to defend on the grounds of a qualified privilege. The factual question as to whether or not Mr. Newbury's statements went beyond what was necessary to reply to the inquiry made of him was also a fact issue which could have been appropriately framed if the defense of privilege had been invoked. In his Brief for Appellee in the Court of Appeals below, petitioner said:—

> " . . . Each of those contentions, of course, raise factual issues. Each was a suitable question for the jury *if* the defense of privilege was to be interposed. Mr. Love would have been glad to go to the jury on any or all of those factual issues. However, as both his Answer and his opening statement to the jury—indeed, the whole record—makes clear, privilege

was not the defense upon which Mr. Newbury relied. He defended one step ahead of privilege. He denied making the statements. Having elected *in his opening statement* to defend at the very threshold of privilege, Mr. Newbury released Mr. Love from any obligation to negate such issues as relate to the defense of privilege; i.e., the nature of the occasion on which the statements were made, the question of malice, the question as to the relation between the scope of the inquiry and the extent of the answer, the issue of truth, reasonableness, or alternatively the performance of an official duty. Mr. Newbury—wisely or unwisely—went to the jury on factual issues that cut off any issue related to privilege. He cannot now be heard to complain because he lost.

"There is no obligation upon a litigant to plead privilege as a defense to a suit for slander. If a litigant chooses to rely exclusively upon the factual defense that he did not make any statements concerning the plaintiff, he is free to do so. And, if a litigant chooses so to defend, this Court of Appeals has neither right nor power to retry that case for him or to make it appear that he defended on grounds which he did not defend upon."

Appropriate decisions of this Court, as well as the Seventh Amendment, were expressly relied upon in the court below and cited to that court by the petitioner. **Dimick v. Schiedt** (1935) 293 US 474, 487; **Baltimore & C. Line v. Redman** (1935) 295 US 654, 657; **Rochin v. California** (1952) 342 US 165, 169, 170; **Montgomery Ward & Co. v. Duncan** (1940) 311 US 242; and **Johnson v. N.Y.N.H. & H. Ry. Co.** (1952) 344 US 48, were extensively quoted. Further as being almost precisely in point, petitioner cited and quoted the following excerpt from the opinion of Judge Swann in **Flint v. Youngstown Sheet & Tube Co.** (2nd Cir-1944) 143 F2d 923, 924, which was later paraphrased by the Court of Appeals below in **Ersler v. Schneider Corp.** (1951) 88 US App DC 371, 188 F2d 1022:—

> "• • • . If the plaintiffs [here, read 'defendant'] wished to assert that there was no case to go to the jury, they were bound to move for a directed verdict. They may not take a verdict and then complain that it is not what they expected; or at least their right to complain ends with the trial judge. [Citation]. Under federal practice an appellate court will not consider the question of the sufficiency of the evidence in the absence of a request for an instructed verdict. **Hartford Life & Annuity Ins. Co. v. Unsell,** 144 US 439, . . . • • • ."

In **Hartford, etc. v. Unsell,** the headnote on this point reads as follows:—

> "If, in a case where the evidence warranted a request for a peremptory instruction to find for the defendant, no request for such instruction was made, it cannot be made a ground for reversal that the issues of fact were submitted to the jury."

The foregoing statement of the law has never been questioned sofar as petitioner can ascertain after diligent research and, quite to the contrary, it appears that this rule has been consistently reaffirmed in most of the circuits of the United States Courts of Appeals. In **Strika v. Netherlands Ministry of Traffic** (2nd Cir-1950) 185 F2d 555, 556, Judge Learned Hand commented on a similar situation, and in these words:—

> "• • • . [T]he first question is whether the answer of the jury shall stand that the defendant was not guilty of negligence; and that depends upon whether the evidence of the ship's negligence was so one-sided that the judge should have directed a verdict in favor of the plaintiff. That is, however, not before us, because the plaintiff did not ask for a direction on the issue and therefore may not raise it on appeal. • • • ."

At the page cited, Judge Hand cites numerous cases in support of the foregoing point; and to the same effect see **Edward v. Steinns** (4th Cir-1953) 207 F2d 734, citing several additional cases at page 736.

In short, petitioner did all that the law would permit him to do. But it was to no avail. The court below chose to disregard petitioner's rights under the Seventh Amendment and chose to turn a deaf ear to the decisions of this Court. Thus, notwithstanding the indisputable facts (a) that Mr. Newbury went to the jury on a simple fact issue and (b) under jury instructions which satisfied him, (c) without asking for a directed verdict when all of the evidence was in, and (d) without asking for a judgment notwithstanding the verdict after he learned of the jury verdict, and (e) without asking for a new trial, the Court of Appeals below undertook to rule that the trial court should have entered a "judgment of dismissal" for the reason that the evidence showed that the statements charged to Mr. Newbury "were made in the proper performance of his official duties and [were], therefore, absolutely privileged."

It will little avail for this Court to lay down rules which *may* serve as guides to the United States Courts of Appeals in the performance and extent of their appellate function. The rulings of this Court must be binding upon those courts if the high purpose of this Court is to be made effective. Clearly, the Court of Appeals below has disregarded the rulings of this Court and it has done so to the grievous prejudice of this petitioner. Clearly, this Court should grant the present writ.

It will be remembered that as the appellant in the court below, the respondent demanded reversal on the ground that the trial court erred "in failing to direct a verdict for appellant on the ground that appellant's statements were either absolutely or qualifiedly privileged." No other error was assigned. No other error was passed on by the court below.

The petitioner, in response to that assignment of error, contended in the court below (1) that due to respondent's failure to ask for a directed verdict at the close of all

the evidence, he was precluded from asking for judgment notwithstanding the verdict or for a new trial; (2) that by reason of the fact that respondent had failed to ask the trial court for judgment notwithstanding the verdict or for a new trial as permitted by Rule 50 of the Federal Rules of Civil Procedure; and (3) in view of the terms of the Seventh Amendment, restricting the terms upon which facts tried to a jury could be re-examined, the Court of Appeals was without power to reverse on the theory advanced by respondent. Thus, in his Brief for Appellee, the petitioner's counter-statement of the question is in these words:—

> "In appellee's opinion, the question presented by this appeal is whether this Court can review a District Court judgment which rests on a jury verdict in a common law action when (1) no request for a directed verdict was made at the conclusion of all of the evidence, (2) no objection was made to any jury instruction given (or refused) by the trial judge, (3) no motion for a judgment n.o.v. was made, and (4) no new trial was requested."

The Court of Appeals ignored the basic question before it and reversed the trial court and ordered the complaint dismissed on the ground that "appellant's [respondent's] statements were made in the proper performance of his official duties and [were], therefore, absolutely privileged." The "statements" referred to in that ruling were those which, according to petitioner, had been made by the respondent in a 1952 telephone conversation with a Mr. Maginnis. The Court of Appeals to the contrary notwithstanding, the respondent did *not* (and, indeed, *could not*) claim that it was within the proper performance of his official duties for him to have made those statements. Thus, in presenting his own case, the respondent on direct questioning of his trial attorney, Mr. Toomey testified as follows:—

"MR. TOOMEY: Did you have such a conversation [i.e., the 1952 telephone conversation] with Mr. Maginnis?

"MR. NEWBURY: I did not.

"MR. TOOMEY: How are you so sure that you did not?

"MR. NEWBURY: Well, I have been instructed, after the case had been closed by the Commission, the Civil Service Commission, there were several suits instituted, the files were turned over to the Judge Advocate General of the Army, and *I was instructed to pass on all papers, calls, and so forth, through the Judge Advocate General, therefore, if any calls came or any correspondence came, I definitely sent them to the Judge Advocate General.*" (JA-66, 67. Emphasis added).

It is respectfully submitted that in the face of that statement, the Court of Appeals could not rule that Mr. Newbury was absolutely privileged to comment on Mr. Love when Mr. Maginnis telephoned him.

CONCLUSION

As this Court said in **Tennant v. Peoria & P.U. Ry. Co.** (1944) 321 US 29, 35, when speaking of the right guaranteed by the Seventh Amendment, there is no reason why this Court should abdicate its "duty to protect and guard that right." To deny this writ would be to deny the Seventh Amendment itself, for only the Supreme Court of the United States can enforce the limitations which it imposes on the inferior appellate courts of the Federal judiciary.

By granting this writ, this Court will not only reaffirm its long standing and often invoked determination to protect the right of trial by jury as a basic feature of Federal jurisprudence, **Baylis v. Travelers Ins. Co.** (1884) 113 US 316, 321, but also it will subserve the highest principle that any legal system can purport to accept—

namely, the concept of even-handed justice—for, upon the instant record no one can consider that the Court of Appeals below dealt justly or fairly with this petitioner.

Respectfully submitted,

CHARLES F. O'NEALL
Counsel for Petitioner
1625 K Street, N.W.
Washington 6, D. C.
[RE-7-1587]

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13245

ARTHUR W. NEWBURY, APPELLANT

v.

HAROLD ROBERT LOVE, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided February 28, 1957

Mr. Joseph Langbart, Attorney, Department of Justice, with whom *Assistant Attorney General Doub* and *Messrs. Oliver Gasch*, United States Attorney and *Paul A. Sweeney*, Attorney, Department of Justice, were on the brief, for appellant.

Mr. Charles F. O'Neall for appellee.

Before WILBUR K. MILLER, BAZELON and WASHINGTON, Circuit Judges.

PER CURIAM: Appellee, discharged from Government employment, consulted an attorney in an effort to obtain reinstatement. The attorney telephoned the appellant, the Government personnel officer involved, and discussed the case with him while appellee listened on an extension. In the course of the conversation, appellant said that appellee "had been fired on charges and that the charges were that [appellee] had taken papers out of the files at Jeffersonville, Indiana, Quartermaster Depot and given them to

Senator Capehart without authority. . . . And that he had been found guilty of that by the Civil Service Commission, and other charges." Based on this matter appellee was awarded a verdict of $100 in his defamation suit.[1] This appeal resulted from the judgment entered on that verdict.

Appellant contended below that the statements complained of were not actionable, even if defamatory, because (1) he made them in connection with his official duties; and (2) he made them in reply to an inquiry from appellee's attorney and his reply was not malicious and did not go beyond the inquiry. *National Disabled Soldiers' League* v. *Haan*, 55 App. D.C. 243, 4 F.2d 436 (1925). The District Court overruled these contentions.

We think it clear that, in the circumstances of this case, appellant's statements were made in the proper performance of his official duties and are, therefore, absolutely privileged. Cf. *Colpoys* v. *Gates*, 73 App.D.C. 193, 118 F.2d 16 (1941). Since a judgment of dismissal should have been entered on this ground,[2] we need not decide any other questions presented.

Reversed and remanded with instructions to dismiss the complaint.

---

[1] The suit had been based upon other allegedly defamatory material as well, but those matters were dismissed out of the case and are not here involved.

[2] This defense was adequately, if inartistically, asserted in the District Court.

Filed Feb. 28, 1957. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

January Term, 1957.

C. A. 2375-53

No. 13,245

ARTHUR W. NEWBURY, APPELLANT

v.

HAROLD ROBERT LOVE, APPELLEE

Appeal from the United States District Court
for the District of Columbia.

Before: WILBUR K. MILLER, BAZELON and WASHINGTON, Circuit Judges.

JUDGMENT

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court with instructions to dismiss the complaint.

It is further ORDERED by the Court that appellant herein recover from appellee his taxable costs on this appeal and have execution therefor.

Dated: February 28, 1957.

Per Curiam.

Filed Apr. 17, 1957. Joseph W. Stewart, Clerk

• • • •

ORDER

Upon consideration of appellee's petition for a rehearing in banc, it is

ORDERED by the Court that the aforesaid petition be, and it is hereby, denied.

Per Curiam.

Dated: April 17, 1957

Circuit Judges PRETTYMAN and BURGER did not participate in the foregoing order.

Filed Apr. 17, 1957. Joseph W. Stewart, Clerk

• • • •

ORDER

Upon consideration of appellee's petition for a rehearing before the division of this Court deciding this case, it is

ORDERED by the Court that the aforesaid petition be, and it is hereby, denied.

Per Curiam.

Dated: April 17, 1957

APPENDIX B

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1957.

HAROLD ROBERT LOVE,
Petitioner,

vs.

ARTHUR W. NEWBURY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 20th, 1957.

HUGO L. BLACK
Associate Justice of the Supreme Court of the United States.

Dated this 16th day of July, 1957.

• • • •

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 23rd, 1957.

/s/ Hugo L. Black

Associate Justice of the Supreme Court of the United States.

Dated this 20th day of August, 1957

Office - Supreme Court, U.S.
FILED
SEP 20 1957
JOHN T. PEY, Clerk

No. 397

In the Supreme Court of the United States

OCTOBER TERM, 1957

HAROLD ROBERT LOVE, PETITIONER

v.

ARTHUR W. NEWBURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
PAUL A. SWEENEY,
JOSEPH LANGBART,
Attorneys,
Department of Justice, Washington, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	6
Conclusion	11

CITATIONS

Cases:

Barr v. *Matteo and Madigan*, 244 F. 2d 767, petition for certiorari pending, No. 409, this Term	4, 8, 11
Booth v. *Fletcher*, 101 F. 2d 676, certiorari denied, 307 U. S. 628	4
Cooper v. *O'Connor*, 99 F. 2d 135, certiorari denied, 305 U. S. 643	10
Green v. *Reading Co.*, 183 F. 2d 716	9
Gregoire v. *Biddle*, 177 F. 2d 579, certiorari denied, 339 U. S. 949	10
Harlem Taxicab Ass'n v. *Nemesh*, 191 F. 2d 459	9
Irvin Jacobs & Company v. *Fidelity & Deposit Co. of Md.*, 202 F. 2d 794	9
Keen v. *Overseas Tankship Corp.*, 194 F. 2d 515, certiorari denied, 343 U. S. 966	9
Montgomery v. *Virginia Stage Lines*, 191 F. 2d 770	9
Moreau v. *Pennsylvania R. Co.*, 166 F. 2d 543	9
Schneider v. *O'Neal*, 145 F. Supp. 120	7
Sweeney v. *United Features Syndicate*, 129 F. 2d 904	9
United States v. *Kelinson*, 205 F. 2d 600	8–9
Washington Annapolis Hotel Co. v. *Riddle*, 171 F. 2d 732	10
Williams v. *Powers*, 135 F. 2d 153	9

439136—57

Constitution and Statutes:

	Page
Constitution of the United States, Seventh Amendment	6
5 U. S. C. 309	4
District of Columbia Code, Title 12, Section 201	2
Miscellaneous:	
Comment: *Defamation Immunity for Executive Officers*, 20 U. of Chi. L. Rev. 677 (1953)	11
Developments in the Law—Defamation, 69 Harv. L. Rev. 875 (1956)	8
Developments in the Law—Remedies Against the United States and Its Officials, 70 Harv. L. Rev. 827 (1957)	11
F. R. Civ. P:	
Rule 8 (e) (2)	10
Rule 12 (d)	7
Rule 12 (h)	7, 8
Rule 15 (b)	8
Rule 41 (b)	7
Rule 46	8
Rule 50	7
Rule 51	8
5 Moore's *Federal Practice* (2nd ed.):	
pp. 1035, *et seq*	7
pp. 2313, *et seq*	7

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 397

HAROLD ROBERT LOVE, PETITIONER

v.

ARTHUR W. NEWBURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

Judgment of the District Court, pursuant to the verdict of a jury, was entered without an opinion. The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. 20–21) is reported at 242 F. 2d 372.

JURISDICTION

The judgment of the Court of Appeals was entered on February 28, 1957. A petition for rehearing, filed out of time by leave of the Court of Appeals, was denied on April 17, 1957 (Pet. App. 23; R. 101, 142–143). By successive orders dated July 16, 1957, and

August 20, 1957, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to August 23, 1957 (Pet. App. 24–25). The petition for a writ of certiorari was filed on August 23, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether, in an action for libel and slander brought against respondent, a government official, the court below erred in holding that the defense of absolute privilege had been adequately raised in the District Court.

STATEMENT

The petitioner, Harold Robert Love, on May 26, 1953, instituted a suit *pro se* alleging that respondent, Arthur W. Newbury, had defamed him beginning about May 1947. The complaint specified seven specific incidents (R. 1–5). Respondent filed a motion for summary judgment on the ground that the complaint failed to state a cause of action, since the alleged defamations were acts performed by him in his official capacity as Director of Civilian Personnel, United States Army Finance Corps, and Special Assistant for Civilian Personnel to the Chief, Army Audit Agency (R. 7). The motion was denied, whereupon respondent filed an answer raising the same defense. The answer further alleged that the District of Columbia one-year statute of limitations (Title 12, D. C. Code, Section 201) barred action for the incidents specifically enumerated in the complaint, that the statements complained of were true, and

that the statements were privileged, having been made in good faith and without malice in the carrying out of a duty imposed upon respondent (R. 7–9).

At the trial, petitioner adduced evidence only as to two of the libels, *i. e.*, (1) two letters of charges, dated July 11 and 18, 1947, concerning the personnel action taken with respect to petitioner's position as auditor with the Army Audit Agency (R. 19, 22–29, 33, 45, 47–49), and (2) respondent's affidavit of September 2, 1947, filed in connection with the personnel proceedings against petitioner (R. 19, 32–3, 48–50). Petitioner also testified about an alleged telephone conversation between an attorney, Harry J. Maginnis, and respondent in June 1952. The telephone conversation, which constituted slander and not libel, was not specifically mentioned in the complaint nor in any of the pre-trial proceedings,[1] although Mr. Maginnis was one of twenty-three persons mentioned in petitioner's answers filed in response to respondent's interrogatories (R. 10–11).

Petitioner's testimony concerning the telephone call was as follows: After reading an article in a Chicago newspaper about the successful efforts of an attorney, Harry Maginnis, petitioner came to Washington for the purpose of consulting with Mr. Maginnis in connection with his dispute with the Civil Service Commission, which dispute petitioner believed closely paralleled the cases previously handled by the attorney (R. 35, 43, 44, 68, 69). Mr. Maginnis, in petitioner's presence, telephoned Newbury at his government office

[1] At pre-trial, petitioner limited his case to libel (R. 12–13).

(R. 35, 36, 44). Petitioner stated that he sat across the desk from Mr. Maginnis when the call was made, that he could hear everything that was said on both ends (R. 36), and that "toward the end" of the conversation he listened in on an extension (R. 37–40). After the court restricted testimony to what was actually heard on the extension, petitioner said that respondent told Maginnis that "Love had been fired on charges and that the charges were that * * * Love * * * had taken papers out of the files at Jeffersonville, Indiana, Quartermaster Depot and given them to Senator Capehart without authority. * * * And that he had been found guilty of that by the Civil Service Commission, and other charges" (R. 40–41). Respondent, when called as a witness during the presentation of petitioner's case, testified as to his participation in the personnel proceedings against Mr. Love while administering the civilian personnel program of the Army Audit Agency as Chief, Civilian Personnel Branch of the Management Division of the War Department, Finance Corps (R. 45–48).

At the close of the petitioner's case, the Assistant United States Attorney representing the respondent[*] made a motion for "the Court to direct the jury to enter a verdict in defendant's favor" (R. 48). This motion asserted the defense of absolute immunity, *i. e.*, that

---

[*] Respondent has been represented by attorneys of the Department of Justice throughout this proceeding pursuant to 5 U. S. C. 309; see, *e. g.*, *Booth* v. *Fletcher*, 101 F. 2d 676 (C. A. D. C.), certiorari denied, 307 U. S. 628; and *Barr* v. *Matteo and Madigan*, No. 409, this Term, pending on petition for certiorari.

all the incidents of defamation were actions by the respondent in connection with the performance of official duties. In addition, it was urged (1) that action with respect to the three alleged libelous documents was barred by the District of Columbia one-year statute of limitations, and (2) that the telephone conversation was a qualifiedly privileged incident because Mr. Maginnis was acting in a representative capacity (R. 51–52). The motion was granted except as to the telephone conversation (R. 66).

The respondent presented his case, and denied that there was a telephone conversation between himself and Mr. Maginnis in June 1952 regarding Love (R. 66–67). The respondent also testified that his only personal contact with the petitioner took place in 1948 at the Civil Service Commission hearing (R. 67). Mr. Maginnis was not called as a witness, but it was stipulated that if he had been called he would have testified that Mr. Love had called on him, and that he associated the petitioner's and respondent's names together (R. 76).

The questions as to whether the telephone conversation took place, whether the statements attributed to respondent were made with malice, and the amount of damages, if any, were submitted to a jury. The jury granted petitioner a verdict and judgment of $100 as compensatory damages (R. 92).

On appeal, the Court of Appeals for the District of Columbia Circuit, in a *per curiam* opinion, held that, "in the circumstances of this case, appellant's [respondent's] statements were made in the proper perform-

ance of his official duties and are, therefore, absolutely privileged" (242 F. 2d at 373; R. 100; Pet. App. 21), observing in a footnote that "[t]his defense was adequately, if inartistically, asserted in the District Court" (*ibid.*).

ARGUMENT

Petitioner broadly declares that the Court of Appeals erroneously reversed the trial court's judgment on the evidence in derogation of the Seventh Amendment and accepted principles of appellate review.[3] Petitioner's only real quarrel, however, is with the Court of Appeals' conclusion that the privilege defense was "adequately, if inartistically, asserted in the District Court." The ruling, we submit, is clearly correct.

1. As respondent pointed out in the court below, when counsel for respondent at the close of plaintiff's (petitioner's) case "move[d] the Court to direct the jury to enter a verdict in defendant's favor" (R. 48), an attack was not being made on the sufficiency of the evidence.[4] Instead, it was a motion to dismiss based on Love's "failure to state a claim upon which relief can be granted * * *" (Rule 12 (h), F. R. Civ.

---

[3] To support his contention that the Court of Appeals committed basic error in this case, petitioner, disregarding the realities of the situation, particularly the rulings of the trial court on various questions which shaped the course of the trial, relies on a series of statements by counsel in the trial court, statements in his brief below, and respondent's denial that there was a telephone conversation.

[4] Therefore, it was not a motion under either Rules 50 or 41 (b), F. R. Civ. P.; see 5 Moore's *Federal Practice* (2d ed.), pp. 2313, *et seq.* and pp. 1035, *et seq.*

P.), which *"may also be made * * * at the trial on the merits * * *"* (*ibid.*; emphasis added). Cf. *Schneider* v. *O'Neal,* 145 F. Supp. 120 (E. D. Ark.); and see also Rule 12 (d), F. R. Civ. P., which provides that "hearing and determination [of a motion to dismiss can] be deferred until the trial." The motion can also be viewed as a renewal of the motion to dismiss (implicit in the earlier motion for summary judgment) with the issues of fact, if any, in a position to be resolved on the basis of the testimony which petitioner had adduced to support his cause of action. The trial judge granted the motion as to the allegedly libelous documents both on the grounds of absolute privilege and limitations,[5] but after extended argument, the trial judge denied the motion as to the telephone conversation (R. 48–66). As is clear from the record, respondent had no previous opportunity to attack the legal sufficiency of the telephone conversation as a cause of action,[6] and the motion at the close of petitioner's case was an appropriate and timely means of raising that defense.[7]

---

[5] The trial motion differed from the motion for summary judgment by including the telephone conversation (as to which qualified privilege was also raised), and also by raising the bar of the statute of limitations as to the libel incidents.

[6] The testimony about the telephone conversation was not adduced solely for the purpose of proving another defamatory incident, but its main purpose was stated by petitioner's counsel to be to circumvent the statute of limitation defense on a "theory of republication" (R. 59–61).

[7] Defense counsel had other alternatives under Rule 15 (b) F. R. Civ. P., which would have required an amendment of the pleadings and also necessitated a continuance. Instead, the simpler course of action permitted by Rule 12 (h), F. R. Civ. P., was taken.

2. Although petitioner adheres to the arguments made in, and rejected by, the Court of Appeals, he does not now flatly contend that respondent failed to comply with Rule 51, F. R. Civ. P., relating to instructions to the jury. Petitioner recognizes that these contentions either ignore the relevance of Rule 46, F. R. Civ. P.,[5] to the circumstances in question, or that they primarily concern respondent's arguments about the defense of qualified privilege, a question which the court below found unnecessary either to explore or decide.[6]

Moreover, time and again courts have indicated that one does not waive error committed by a trial court by continuing with the trial in accordance with the court's rulings without further effort to have the court reverse itself. There is nothing which "require[s] a lawyer to become a chattering magpie" on such occasions. *United States* v. *Kelinson*, 205 F. 2d 600, 601–602 (C. A. 2). Counsel "is not required to indulge in reiterative insistence in order to preserve his client's rights." *Irvin Jacobs & Co.* v. *Fidelity & Deposit Co. of Maryland*, 202 F. 2d 794, 801 (C. A. 7); *Moreau* v. *Pennsylvania R. Co.*, 166 F. 2d

---

[5] Rule 46, F. R. Civ. P., states in pertinent part: "Formal exceptions to rulings * * * of the court are unnecessary; * * * it is sufficient that a party, at the time of the ruling * * *, makes known to the court the action which he desires the court to take * * *; and * * * the absence of an objection does not thereafter prejudice him."

[6] The defense was raised here even though we do not consider it adequate as a protection to government officials. See Petition for Certiorari in *Barr* v. *Matteo and Madigan*, No. 409, this Term, pp. 7–8, 12; see also *Developments in the Law—Defamation*, 69 Harv. L. Rev. 875, 917–918 (1956).

543, 545 (C. A. 3). To the same effect are the rulings in *Keen* v. *Overseas Tankship Corp.*, 194 F. 2d 515, 519 (C. A. 2), certiorari denied, 343 U. S. 966;[10] *Harlem Taxicab Ass'n* v. *Nemesh*, 191 F. 2d 459, 461 (C. A. D. C.); *Montgomery* v. *Virginia Stage Lines*, 191 F. 2d 770, 773 (C. A. D. C.); *Williams* v. *Powers*, 135 F. 2d 153, 156 (C. A. 6).[11] See also *Sweeney* v. *United Feature Syndicate*, 129 F. 2d 904, 905–6 (C. A. 2); and *Green* v. *Reading Co.*, 183 F. 2d 716, 719 (C. A. 3).

No matter what the verbal formulation, the cases cited enunciate a position that refutes the petitioner's basic contention that respondent, by presenting evidence in support of his denial that there was a telephone conversation, waived whatever error the trial judge may have committed with respect to the motion to dismiss made at the end of petitioner's case.

Modern practice permits one to defend on alternative grounds. When the trial court denied the respondent's motion based on privilege at the end of petitioner's case, respondent was not barred from presenting other defenses that were available to him. See, *e. g.*, *Washington Annapolis Hotel Co.* v. *Riddle*, 171 F. 2d 732, 736 (C. A. D. C.), where the court said that Rule 8 (e) (2), F. R. Civ. P., permitted

[10] "Nothing goes further to disturb the proper atmosphere of a trial than reiterated insistence upon a position which the judge has once considered and decided. The notion is wholly untenable that in order to protect himself against an imputed surrender, a party must reassert what has been overruled every time the occasion comes up again." (194 F. 2d at 519.)

[11] "• • • [W]here it appears in the record that the point urged on appeal was called to the attention of the trial court in such a manner as to clearly advise it as to the question of law involved, that is sufficient." (135 F. 2d at 156.)

denial of an utterance of slanderous words and also a defense of privilege. Thus, respondent could plead the defense of immunity, which presupposes that there was a telephone conversation, even though he also denied that the event occurred.

3. Inasmuch as the jury found that there had been a telephone conversation, respondent did not seek to have the Court of Appeals reverse that factual determination. But this did not bar the court below from deciding the question of law with respect to the privilege defense, if it had been raised in the trial court.[12] When respondent appealed from the verdict and judgment entered, he did so on the ground that he had either a qualified or absolute privilege, *i. e.*, the

---

[12] The telephonic inquiry by Mr. Maginnis was directed to respondent apparently in the hope that the latter, who, at the time, was the Director of Civilian Personnel, Finance Corps, United States Army, and Special Assistant for Civilian Personnel to the Chief, Army Audit Agency, would take some further administrative action toward reinstating petitioner who in 1947 had been discharged from his position as an auditor with the Army Audit Agency (R. 56–57). Respondent urged that he was immune because the action he allegedly took was in connection with official duty, in other words, his statements were made "'*in relation* to matters committed by law to his control or supervision' * * * or * * * '*more or less* [in] *connection with* the general matters committed by law to his control or supervision.' (Spalding v. Vilas, 161 U. S. 483, 498, * * *." *Cooper* v. *O'Connor*, 99 F. 2d 135, 139 (C. A. D. C.), certiorari denied, 305 U. S. 643; see also *Gregoire* v. *Biddle*, 177 F. 2d 579 (C. A. 2), certiorari denied, 339 U. S. 949; *Developments in the Law—Remedies Against the United States and Its Officials*, 70 Harv. L. Rev. 827, 837 (1957); Comment: *Defamation Immunity for Executive Officers*, 20 U. of Chi. L. Rev. 677, 679 (1953.) In *Barr* v. *Matteo and Madigan*, 244 F. 2d 767, 768 (C. A. D. C.), petition for certiorari pending (No. 409, this Term), another panel of the court below accepted the decision in this case as correct.

statements made during the telephone conversation were in the course of or had connection with the performance of his official duty. This, in short, was not an attack on the facts as found by the jury, but rather acceptance of the factual determination. The Court of Appeals, we submit, correctly held that the defense was "adequately" (although possibly "inartistically") raised in the District Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
PAUL A. SWEENEY,
JOSEPH LANGBART,
Attorneys.

SEPTEMBER, 1957.

U. S. GOVERNMENT PRINTING OFFICE: 1957

LIBRARY
SUPREME COURT, U.S.

FILED
JAN 3 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 397

HAROLD ROBERT LOVE,
Petitioner

v.

ARTHUR W. NEWBURY,
Respondent

PETITION FOR RECONSIDERATION

CHARLES F. O'NEALL
Counsel for Petitioner
1625 K Street, N.W.
Washington 6, D. C.

WILSON EPES PRINTING CO · RE 7-6002 · WASHINGTON 1, D. C.

In The

Supreme Court of the United States

October Term, 1957

No. 397

Harold Robert Love,
Petitioner

v.

Arthur W. Newbury,
Respondent

PETITION FOR RECONSIDERATION

Jurisdiction

According to Rule 58(2) of the General Rules of this Court, a petition for reconsideration will be accepted for filing by the Clerk if tendered within 25 days of the denial of a petition for writ of certiorari. After opposition was filed herein by the Solicitor General of the United States, this Court on 9 December 1957 denied petitioner's request for review of an order of the United States Court of Appeals for the District of Columbia Circuit which reversed the jury-based judgment that petitioner had won in the District Court. The reversal relied upon facts not in the record, and ignored petitioner's rights under the Seventh Amendment. Since the 25 days not having elapsed, this petition is timely and this Court still retains jurisdiction over this case.

Grounds for Rehearing

This request for rehearing is filed pursuant to, and with full regard for the restrictions specified in, Rule 58(2).

The "grounds available to petitioner" which (a) have "not [been] previously presented to this Court, and (b) which are sufficiently "substantial" to justify this Court in reconsidering the order denying certiorari, are three in number and are as follows:—

1. Respondent's opposition to the writ rests upon the two false statements of fact next hereinafter quoted; but, further, the respondent's argument suffers from the fatal defect of depending absolutely upon an invalid inarticulate premise. Thus, respondent assumes that a mid-*trial* motion which attacks the sufficiency of a claim (complaint) relieves the movant from any need to ask for a directed verdict after he presents his own evidence, and likewise does away with the need for a motion for judgment n.o.v. or for a new trial. In other words, respondent necessarily contends that Rule 12(h) of the F.R. Civ. P. overrides the Seventh Amendment.

2. Although the entire thrust of respondent's argument is invalid, it is important to observe that respondent's brief contains a misstatement of fact which is crucial to respondent's entire argument. Thus, on page 6 of his brief, the respondent declared that:—

> ". . . [W]hen counsel for respondent at the close of plaintiff's (petitioner's) case 'move[d] the Court to direct the jury to enter a verdict in defendant's favor' (R.48), an attack was not being made on the sufficiency of the evidence. Instead, it was a motion to dismiss based on Love's 'failure to state a claim upon which relief can be granted * * *' (Rule 12(h), F.R. Civ. P.) . . ."

3. Respondent's brief (page 7) also contains another inaccurate statement of fact; one which is closely related

to the above quoted statement, and equally essential to his invalid argument:—

> "* * *. As is clear from the record, respondent had no previous opportunity to attack the legal sufficiency of the telephone conversation as a cause of action, and the motion at the close of petitioner's case was an appropriate and timely means of raising that defense."

As to Respondent's Inarticulate Premise

As to the first ground stated above, it should be enough to point out that respondent spends his entire brief trying to convince this Court of the fact that the mid-trial motion was not an attack on the sufficiency of the evidence. Respondent fails to cite any case which even suggests that a mid-trial motion can, if made under one instead of another court rule, excuse a defendant from complying with the prerequisites to appellate review when he proceeds to put on his own case after the court denies his mid-trial motion. Therefore, even if we ignore the fact that respondent's *trial* counsel himself called the mid-trial motion a motion for a directed verdict, and even if we call that motion a motion to dismiss for "failure to *state* a claim." [N.B. respondent cannot afford to use the proper phrase "failure to *prove* a claim", so he must fall back on the terminology applicable to pre-trial skirmishing], it was nevertheless essential for respondent to ask for a directed verdict at the close of all the evidence if he ever wanted to attack that jury's verdict and resulting judgment. Respondent failed to do so.

It is respectfully urged that the Solicitor General be invited to explain what consequence can legally attach to the conclusion that respondent's mid-trial motion was made under Rule 12(h) of the F.R. Civ. P. in view of respondent's failure to follow the steps which this Court has said are indispensable to comply with the Seventh Amendment.

As to Respondent's Misstatements of Fact

The two statements quoted above from respondent's brief constitute, when taken together, the foundation upon which respondent's entire argument rests. Thus, even if respondent's argument were valid, if either of the above quoted statements are shown to be incorrect, the whole opposition to review by writ of certiorari must fail.

Both of the above quoted statements are incorrect. Their falsity is demonstrable from the record. The charge that these statements are false is in nowise dependent upon an accidental phrase in a record; nor is there need for any inference to be drawn. The incorrectness of the quoted statements is as blatant as those statements are fundamental to the respondent's argument in this Court. If believed, the key misrepresentations by the respondent create an entirely false impression as to the proceedings in the trial court. Thus, respondent would have this Court believe that sofar as concerns the telephone conversation (the only incident upon which the present judgment rests) respondent's trial counsel relied upon the defense of absolute privilege. However, when the mid-trial motion was made, the record was barren of facts necessary to the defense of absolute privilege. And, no effort was made to supply that deficiency after the mid-trial motion was denied. In fact, and for good reason, respondent's trial counsel declined to defend on grounds of privilege, whether absolute [1] or qualified.[2]

Respondent went to the jury on the basic issue of whether the conversation had taken place. When the jury

---

[1] As pointed out in petitioner's forward brief in this Court (p. 18) a sworn statement by the respondent made it impossible for him to defend upon the ground of absolute privilege.

[2] Petitioner's great wish was that the respondent would *attempt* to defend on grounds of qualified privilege. Quite wisely, the respondent declined to join such issues as relate to qualified privilege. See pages 13 and 14 of petitioner's forward brief in this Court.

resolved that issue against him, the respondent (having failed to make the necessary motion for a directed verdict) had no recourse other than to ask the trial judge for such relief as, through the exercise of judicial discretion, might have been appropriate.[3]

Respondent's argument in opposition to the writ does not rise above the level of a petty quibble. In essence, respondent urges that his mid-trial motion was not an attack upon the sufficiency of the evidence.[4] But, a mid-

---

[3] Support for this view is found in every case that has ever considered the problem. Among others, see the opinion by Swann, J., in FLINT v. YOUNGSTOWN SHEET & TUBE CO. (2nd Cir-1944) 143 F2d 923, 924, cited on page 14 of petitioner's brief and quoted in paraphrase at the top of page 15 of the brief. The rule on which petitioner relies has been stated by this Court, see headnote number 1 of HARTFORD LIFE & ANNUITY INS. CO. v. UNSELL, 144 US 439. See also, L. Hand, J. in STRIKA v. NETHERLANDS MINISTRY OF TRAFFIC (2nd Cir-1950) 185 F2d 555, 556.

[4] The following are some of the remarks made by respondent's trial counsel during the mid-trial motion and they should be enough to establish the utter impropriety of the assertion by respondent's present counsel that, "an attack was not being made on the sufficiency of the evidence."

MR. TOOMEY: . . . We take the position with reference to this alleged telephone call that, viewing the evidence most favorably to the plaintiff, the occasion upon which the conversation was had was at least a qualifiedly privileged occasion. [JA-52].

* * * *

[But even] if the occasion itself is qualifiedly privileged, that doesn't mean the defendant can automatically get off. [JA-52-53].

* * * *

THE COURT: I suppose you are claiming, then, that actual malice would have to be shown?

MR. TOOMEY: It would have to be shown. . . .

I think it is perfectly clear in this case that there is absolutely no evidence upon which a jury could reasonably find actual or expressed malice and even if so, how you could pick out portions of the evidence and say, well, maybe they found malice on the basis of this, all of the evidence is at least as

trial motion can never be less than an attack upon the sufficiency of the evidence. Such a movant may contend that the evidence is insufficient (a) to *support* the claim or complaint, or (b) he may assert that the evidence is insufficient to prove any right in the plaintiff to a recovery as against the defendant. In situation "(a)", the movant assumes the legal sufficiency of the claim (complaint). In situation "(b)", the movant attacks the nature (legal sufficiency) of the fully articulated *case*. Upon whichever theory, the mid-trial motion *must* take account of plaintiff's evidence. The defendant's opportunity to attack the *claim* (complaint) against him vanishes when the first witness speaks from the stand; for, once evidence is adduced at the trial, the complaint (claim) is no longer the measure of plaintiff's case.

Respondent urges that a motion to dismiss a suit for "failure to state a claim" upon which relief can be granted may be made "at the trial on the merits." Rule 12(h), F.R. Civ. P. does so provide. Properly, however, such a motion must be made at the conclusion of the plaintiff's opening statement, since the opening statement is nothing more than an articulation of the *claim* (complaint) asserted by the plaintiff. In the present case, however, respondent's trial counsel did not ask for dismissal of the

---

consistent with the nonexistence of malice as with its presence.

THE COURT: That would be a question for the jury.

MR. TOOMEY: No, Your Honor. First of all, Your Honor has to rule on whether or not they have made a prima facie case of malice and if the evidence is as consistent with the nonexistence of it as with its existence, then they have failed to make a prima facie case and they are not entitled to go to the jury on that question. So, we submit that on that basis, we are entitled to a directed verdict as to the alleged [telephone conversation of] June 1952 . . . . [JA-54-55].

It is respectfully submitted that the foregoing quotations establish, beyond room for argument, that the mid-trial motion by respondent's trial counsel did attack the sufficiency of plaintiff's evidence.

claim at the conclusion of plaintiff's opening statement, or, for that matter, at any time. Instead, he assured the jury that the assertions made by the plaintiff with respect to the telephone conversation would be disproved.

Conclusion

The Solicitor General of the United States is a quasi judicial officer. This Court is entitled to give credence to statements of fact made by, or in the name of, that officer. Certainly, this petitioner does not suggest that the Solicitor General would wilfully misstate a fact to this Court. However, the fact remains that the entire argument advanced by the respondent in this case is grounded on the two statements of fact above quoted; and, both are false. The mid-trial motion was an attack on the sufficiency of plaintiff's evidence; and, it was not the respondent's first opportunity to attack the sufficiency of the claim asserted by the plaintiff with respect to the telephone conversation.

And lastly, irrespective of how it be denominated, the mid-trial motion was still a *trial* motion, and the prerequisites to appellate review of the judgment in the trial court (a motion for a directed verdict at the close of all the evidence followed by either a motion for judgment n.o.v. or a motion for a new trial, or both) were just as indispensable as ever. The restrictions which the Seventh Amendment impose on the power of the Federal appellate court are not changed or modified according to the name assigned to a mid-trial motion.

For the foregoing reasons it is respectfully urged that the Solicitor General should be invited to respond to this petition, and that upon further consideration of this case the writ of certiorari should be granted and the ruling of the appellate court below (which so completely disre-

gards clearly pertinent rulings of this Court [5]) should be reversed.

Respectfully submitted,

CHARLES F. O'NEALL
Attorney for Harold R. Love, Petitioner
1625 K Street, N.W.
Washington 6, D. C.

CERTIFICATION OF COUNSEL

Counsel for petitioner certifies, by his signature hereto, that this Petition for Reconsideration is filed in the best of good faith and that it is not filed for purpose of delay.

CHARLES F. O'NEALL

---

[5] JOHNSON v. NEW YORK, N.H. & H. Ry. CO. (1952) 344 US 48 (quoted at length in the appellate court by petitioner, and not once alluded to by the respondent); ROCHIN v. CALIFORNIA (1952) 342 US 165, 169-170; MONTGOMERY WARD & CO. v. DUNCAN (1940) 311 US 242; BALTIMORE & C. LINE v. REDMAN (1935) 295 US 654, 657; and DIMICK v. SCHIEDT (1935) 293 US 474, 487. See, petitioner's brief in this Court as well as his briefs in the court below where these cases were cited and *relied* upon.